IN THE

SUPREME COURT OF THE UNITED STATES

October Term - 1979

No. 78-1301

WALTER J. HICKEL, a candidate for the office of Governor of the State of Alaska in the Republican Primary, and EDWARD A. MERDES, a candidate for the office of Governor of the State of Alaska in the Democratic Primary,

Petitioners,

vs.

LOWELL THOMAS, JR., Lieutenant Governor of Alaska; PATTY ANN POLLEY, Director, Division of Elections; MARY JO HOBBS, Supervisor of Elections, Juneau, Alaska; JOANNE CRANE, Supervisor of Elections, Nome, Alaska; OCTAVIA HANSEN, Supervisor of Elections, Anchorage, Alaska; ANN SPIELBERG, Supervisor of Elections, Fairbanks, Alaska; JAY HAMMOND, CHANCY CROFT, and JALMAR KERTTULA, candidates for the office of Governor of the State of Alaska in the Republican and Democratic Primaries, respectively,

Respondents.

PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES SUPREME COURT

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Petitioners respectfully pray that a Writ of Certiorari issue to review the final order of the Supreme Court of the State of Alaska entered herein on November 20, 1978 denying Petition for a Rehearing of that Court's Memorandum and Order in Supreme Court of Alaska Appeals Numbers 4281, 4282, 4283, and 4291 and Cross-Appeals Numbers 4284 and 4285, filed and entered October 20, 1978, reversing a judgment of the Superior Court of the State of Alaska for the Third Judicial District filed and entered on October 13, 1978. The Superior Court had ordered and directed that the certifications of elections issued by Lieutenant Governor Thomas to gubernatorial candidates Hammond and Croft be set aside and a new primary election ordered with the candidates limited to Hickel and Hammond in

the Republican primary and Merdes and Croft in the Democratic primary and further ordering a general election to be held either based upon the results of such new primary election or if determined to be not practicable then such general election to be held with the exception of the election of the Governor and Lieutenant Governor, such election to be held, in that event, separately, as soon as practicable thereafter.

The decision of the Supreme Court of the State of Alaska sought to be reviewed by this Petition for Writ of Certiorari in effect reconfirmed the certification of candidates Hammond and Croft, as the Republican and Democratic gubernatorial nominees respectively; ordered their names to be placed on the

general election ballot and the general election to proceed as scheduled; and set aside certain minimum notice and other procedural requirements of the Alaska election laws.

OPINIONS BELOW

The opinion of the Superior Court for the Third Judicial District of Alaska granting petitioners' prayers for relief in their election contest and ordering a new election is printed in Appendix A hereto and is unreported. The opinion of the Supreme Court of Alaska which reversed the judgment of the Superior Court for the Third Judicial District is printed in Appendix B hereto and is not yet reported in the official reports. The Petition for Rehearing to the Supreme Court of Alaska is printed in Appendix D hereto.

JURISDICTION

The final order of the Supreme Court of the State of Alaska was made and entered on November 20, 1978, and is printed in Appendix C hereto. Such final order denied a rehearing of the Memorandum and Order of said court entered on October 20, 1978, and printed in Appendix B hereto. The jurisdiction of this Court is invoked under 28 U.S.C. ¶ 1257(3).

QUESTIONS PRESENTED

1. In effectively denying petitioners access to the ballot as candidates for Governor of the two major parties, did the State of Alaska, acting respectively through its judiciary and executive branches of government, deny petitioners their entitlement to privileges and immunities of citizens in the several states

and deny them their right and privilege to exercise their franchise and to seek public office without due process of law and/or deny them the equal protection of the laws, contrary to the provisions of article IV, section 2, clause 1, of the United States Constitution and the Fourteenth Amendment thereto, in the following respects:

(a) By validating, without color of law and contrary to the express provisions of law, a combined state-federal primary election previously invalidated because, as found by the Trial Court in an election contest: "it was so permeated with numerous serious violations of law (as to cast) substantial doubt on the outcome of the vote."

(b) By arbitrarily "reconstructing" the result of a close and con-

tested election, in which the margin between the putative winners and losers was less than 100 or 300 votes, respectively, and in which questioned, dubious and improperly cast or handled ballots exceeded 10,000, by means of resorting to an unprecedented so-called "statistical method" unauthorized by statute or prior judicial decision and contrary to the Trial Court's finding of fact, after hearing conflicting expert testimony, that such statistical approach was not reliable or trustworthy and, as applied, was biased in favor of the candidates originally certified as having narrowly won the contested election.

(c) By making numerous rulings on the validity of several thousands of ballots, based on assumed facts and circumstances totally unsupported by the

record and contrary to the determinations of the original finder of fact.

(d) By ordering a number of destroyed or mutilated ballots favoring certain of the respondents to be counted in a "re-count" of ballots cast, contrary to the provisions of applicable law and established practice and in a discriminatory fashion whereby similarly defaced or mutilated ballots in favor of petitioners were simultaneously disallowed.

(e) By summarily directing 247 ballots which a Trial Court had found to be disqualified because it could not be determined, from testimony in an adversary proceeding, whether or not they had been tampered with during a period of more than one month, in which they were "lost" or misplaced by election officials in an un-

locked closet accessible to the general public and to election workers and volunteers for the various candidates, all of which was contrary to law and contrary to the findings of the trier of the facts, made after resolving conflicting evidence in an adversary proceeding, including demeanor evidence.

(f) By totally ignoring the fact found by the Trial Court that because of lack of uniformity and the failure of the responsible state officials to adopt regulations or standards with respect to so-called "cross-precinct and cross-district voting," thousands of voters were confused, discouraged from voting, and treated in a discriminatory fashion. Moreover, cross-district voting was sanctioned by the Supreme Court of Alaska, although a

majority of that court (three out of five) found such practice to be not sanctioned by the Constitution of the State of Alaska. Likewise, that Court approved of cross-precinct voting, contrary to the provisions of the statutory election scheme of the State of Alaska and the findings of the Trial Court with respect to its discriminatory effects upon various voters and candidates.

(g) The Alaska Supreme Court ruled that petitioners had "waived" the effect of illegal cross-district voting, a finding totally unsupported by the record, as more fully set forth in paragraph 7 of the Petition for Rehearing filed with the Alaska Supreme Court and printed in Appendix D hereto.[1]

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[1]For the convenience of the court,

The rulings of the Alaska Supreme Court sought to be reviewed here, leave the entire statutory scheme of safeguards, for both state and federal elections in the State of Alaska in a shambles, both retroactively to the detriment of petitioners and prospectively, unless reviewed and

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(footnote continued from p. 9)

the following is the language of the paragraph just referred to: "7. The factual assumption that candidates had waived the effect of illegal cross-district voting is unsupported by the record. On the contrary, one of the candidates attempted to mount a challenge in the Superior Court, but was rebuffed at appellants' insistence. Other evidence in the record suggests that candidates' observers were not allowed to

and relieved by this Honorable Court. There are specific and basic safeguards expressly adopted by the State Legislature to prevent voting fraud, double voting in more than one state in federal and state elections, opportunities for tampering with computer

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(footnote continued from p. 9)

challenge the validity of either absentee or questioned ballots at the state canvas. Moreover, this Court did not address the contention that the public's right to an honest election cannot be estopped.***The statement that there is 'no evidence of non-uniform enforcement sufficient to constitute malconduct' is unsupported by the record and violates appellees' constitutionally protected due process and equal protection rights."

process punchcard ballots, and preserve the integrity of absentee, punchcard and regular ballots. These safeguards were totally abrogated by the decision sought to be reviewed, with the effect of not only depriving petitioners of their rightful place on the ballot in the general election, but also leaving the door wide open to future election fraud, malpractice, and malconduct in both state and federal elections in the State of Alaska.

(h) By directing the counting of absentee ballots in a manner diametrically opposed to mandatory requirements of state law and condoning and inviting fraud, including the counting of a substantial number of absentee ballots postmarked after election day, in direct violation of an express statutory require-

ment of the State of Alaska resulting directly in changing the outcome of the primary election in a manner unfavorable to petitioners.

(i) By sanctioning a patently illegal "early count" of punchcard computer ballots conducted by state officials which violated a host of integrated specific statutes, designated to safeguard the security of these easily manipulated ballots.

(j) By the Supreme Court of Alaska totally ignoring important substantive federal questions of equal protection and due process raised before them and set forth in paragraph XVI of petitioners' brief before the Alaska Supreme Court which is printed as Appendix E hereto.

(k) By failure and refusal to

comply with applicable Alaska statutes of judicial disqualification (AS 22.20.020(c)), the Alaska Supreme Court decided all of the foregoing vitally important issues, affecting as they do both state and federal election processes on a statewide basis, under a cloud of procedural impropriety and possible bias or prejudice, justifying the intervention of this Court to uphold the integrity of the judicial system and to safeguard the guarantees of article IV, section 4 of the United States Constitution as well as the due process and equal protection guarantees of the Fourteenth Amendment thereto.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The principal constitutional provisions involved are article IV of the United States Constitution and the Four-

teenth Amendment thereto. Constitution of Alaska, Article V. Applicable state statutes are pertinent portions of Article V, chapter 20, title 15, Alaska Statutes, and AS 22.20.020(c), pertinent portions of which are set forth in Appendix F.

STATEMENT OF THE CASE

On August 22, 1978, the State of Alaska conducted statewide primary elections for a number of offices, both state and federal, including nominations for the office of United States Senator, United States House of Representatives, Governor and Lieutenant Governor of the State of Alaska, and members of Alaska's bi-cameral legislature. The major gubernatorial contestants in the Republican primary were incumbent Governor Jay Hammond,[2] candidate

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[2]All parties to the ensuing election

for a second term; former Governor and former Secretary of the Interior, Walter J. Hickel,[2] and former Speaker of the House of the Alaska House of Representatives Tom Fink. In the Democratic primary the leading contestants were State Senator Chancy Croft,[2] former State Senator Edward A. Merdes,[2] and State Senator Jay Kertulla[2]. On the night of the primary election unofficial reports showed Walter J. Hickel leading incumbent Governor Jay Hammond by approximately 1,000 votes. One thousand

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(footnote continued from p. 15)

contest and to this Petition. Candidate Fink and other minor candidates filed disclaimers in the election contest proceedings and did not join in the appeals to the Alaska State Supreme Court which followed.

votes is a significant margin in this sparsely populated state. There was a close seesaw battle between the Democratic leading contenders Croft and Merdes, with Croft holding a slim lead on the night of the election. At this point only a few scattered ballots from outlying districts, absentee ballots and an unusually large number of so-called "questioned ballots" remained to be counted. The record reveals that the reason for the large number of "questioned ballots" is because election officials had permitted a large number of voters to cast so-called "questioned ballots" outside of their regularly assigned election district or precinct, a practice unauthorized and with respect to districts expressly forbidden by the Alaska Constitution and Statutes and with respect

to which the Trial Court in the election contest later found conflicting, contradictory and confusing instructions were issued by Alaska's election officials, leading to the disenfranchisement of many thousands of voters. The election machinery in Alaska was under the control and supervision of the elected lieutenant governor, who, under Alaska's Constitution, is elected as a running mate of the gubernatorial nominee of each party; not unlike the system for electing the president and vice-president of the United States. At the time of the election here in question, the incumbent lieutenant governor, the respondent Lowell Thomas, Jr., while not himself a candidate for re-election, had vigorously and aggressively campaigned until the very last moment for

the renomination of the incumbent governor and his former running mate, the respondent Jay Hammond.

During the days which followed the primary election the lead of Republican candidate Hickel began to dwindle and finally it was announced that incumbent Governor Jay Hammond had been renominated by a margin of 98 votes, a margin which was later confirmed by a recount procedure, which was subsequently challenged in the courts of the State of Alaska, as was the conduct of the primary election itself. Likewise, Croft was declared and later certified the winner over Edward A. Merdes by a margin of approximately 270 votes. A total of 108,000 votes were cast in the election. Registered voters were as follows:

64,452	Democrat's
33,837	Republicans
5,788	Other Parties
120,465	Non-partisans
224,542	Registered Voters in August, 1978[3]

In conducting the election the lieutenant governor was assisted by a number of state officials appointed by him, all of whom are named as respondents to this Petition and were named as defendants in the election contest filed in the State Court System.

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[3]See Memorandum Decision of the Superior Court (Appendix A), at p. A-3.

As a result of numerous and voluminous complaints of election day and post-election day irregularities, improprieties, and outright official misconduct, formal challenges were mounted against the election as well as the recount procedures which were conducted thereafter under the supervision of the respondent Lowell Thomas, Jr., the incumbent lieutenant governor, in accordance with applicable Alaska law, which provides for an election contest to be instituted in the Superior Court and for a review of the recount procedures in an original proceeding in the Alaska Supreme Court. By mutual consent of all the parties the election contest matters were consolidated and assigned to the Presiding Judge of the Third Judicial District, at Anchorage, the Honorable

Ralph E. Moody. The Third Judicial District of Alaska contains roughly in excess of half of the population of the State and better than half of its court business. Accordingly it has the largest number of Superior Court judges of any of the four judicial districts of the state. Subsequently, also, the Alaska Supreme Court designated Judge Moody as a special master to determine the facts in the recount review proceedings initiated under the original jurisdiction of the Alaska State Supreme Court.

After various preliminary matters were disposed of, it was agreed that the issues in the case would be submitted to the Superior Court judge in the election contest, (who was also the special master for the recount reveiw), based on

stipulated facts, affidavits, and other documentary evidence in the procedural posture of cross-motions for summary judgment, except for certain contested evidentiary matters, such as whether or not 247 "lost" and later on rediscovered ballots should or should not be counted, because of the intervening months of breached security and exposure to tampering. With respect to that last matter an adversary evidentiary hearing was held, including testimony by expert examiners of questioned documents who had viewed the actual ballots and envelopes in which they were contained. Following that particular evidentiary hearing the Trial Court ruled that the state did not sustain its burden of showing that these ballots were not tampered with and ordered that they not be

counted. On the subsequent appeal which followed, the Alaska Supreme Court ruled, inter alia, that the state had met its burden and ordered the ballots counted, without in any manner seeking to challenge or discredit the fact finding of the Superior Court judge which was based at least in part on demeanor evidence. The result of the count eventually conducted of these ballots favored respondents Hammond and Croft.

Brief mention will be made here of the report and recommendations of the special master on the recount procedures, which were limited to the issue of proper markings of ballots. A number of rulings made on these issues by the lieutenant governor were reversed and some were upheld by the master and in turn many of

these rulings by the Special Master were again reversed by the Supreme Court so as to allow counting of numerous ballots marked in clear violation of express provisions of applicable state statute. Except insofar as this further underscores the cavalier attitude taken by the Alaska Supreme Court towards the state's scheme of controls and safeguards to prevent election fraud, no issue is made in this Petition of these particular rulings since they were not sufficient to change the outcome of the recount and since petitioners believe that the election procedures followed should be invalidated based upon issues raised in the election contest which originated appropriately in the Superior Court and was the subject matter of the bulk of the Supreme Court's

final order here sought to be reviewed. Prior to decision by the Superior Court the parties filed the stipulation of facts more particularly set forth in the Superior Court opinion (Appendix A) in which it was conceded by all parties that there were 97 irregular ballots cast, that there were in contention a total of 3,187 so-called "questioned ballots" involving cross-district votes, cross-precinct votes, and form discrepancies; 2,670 absentee ballots in question including those with no postmark and no date stamp, no postmark and date stamped after election day, absentee ballots with problems as to procedure or form of execution or delivery. The above does not include an additional 8,947 counted absentee ballots which were challenged on the ground that they bore

the signature of one witness only, while the applicable statute appeared to require two such witnesses.[4]

Following the proceedings described above, the trial court made a number of detailed findings of fact and entered conclusions of law and filed its Memorandum Opinion which is set forth in Appendix A and will not be repeated here. Some of the trial courts rulings were appealed by both sides to the litigation. Having considered testimonial evidence, documents, hundreds of affidavits, and voluminous breifs, the trial court concluded as

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[4]For purposes of this petition, the close question of whether one or two signatures are required by Alaska law to validate an absentee ballot is not being presented to this court for reveiw.

follows:

"All parties to this action during argument conceded that no election can be held with no mistakes and that in the course of performing any function certain errors and omissions occur. With this, the Court agrees.

The Court's findings of fact and conclusions of law herein are not based upon any determination by the Court that any of the persons involved did, or failed to do or perform, any act or duty out of an intentional desire to subvert the election process. Neither is there any evidence of fraud or corruption on the part of any state official. However, the Court's

findings do reflect the acts of malconduct, mistakes, and the use of confusing procedures of election officials in violation of state statutes and regulations.

The record tends to indicate that previous elections, in many respects, suffered from similar deficiencies and malconduct this hearing enumerated. However, this can be no consolation, since that does not justify the continuation of such practices in conducting this election regardless of the good motives of dedicated election officials, past or present.

This action calls upon this Court to answer important ques-

tions pertaining to the political rights of the citizens of Alaska. This Court must determine whether the expression of the will of the electorate was frustrated as a result of widespread non-compliance with the election laws of the state.

The ultimate matter to be decided in these motions for summary judgment now before the Court is whether the undisputed facts, when tested under the election laws of Alaska, constitute malconduct on the part of election officials sufficient to change the result of the primary election held on August 22, 1978. This Court has found that certain

conduct must be considered to be individual acts of malconduct. As well, the cumulative effect of these, with many other acts when considered as a whole, is deemed malconduct. Those areas and acts have been noted in the text.

The next question to be determined is if such malconduct was sufficient to change the result of the election. This Court has previously enumerated the effect of those actions on the elective process. There was a frustration or disallowance of certain numbers of ballots for a variety of reasons. In other cases, the findings, by their very nature, indicate the impossibility of a mathe-

matical determination of voters disenfranchised because of state officials' malconduct. As well, these findings reflect the failure of the election officials to follow statutory mandates and to fairly and equitably allow all voters to make their choice as to whether to vote or not to vote, under the same rules and circumstances free of unregulated election official decision as to when and where they could vote in the areas discussed in the foregoing opinion.

This Court finds such cumulative malconduct casts such doubt and suspicion as to raise a doubt as to the true vote of the

people and, therefore, was sufficient to change the result of the primary election of August 22, 1978, as to both plaintiff-candidates (petitioners herein) and both defendant-candidates (certain respondents herein)."[5]

Accordingly the court ordered the certifications of election issued by the lieutenant governor to candidates Hammond and Croft are set aside and a new election ordered at the earliest practicable date in compliance with Alaska laws, administered in a manner not inconsistent with this decision. If possible, the primary election should be held prior to the

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[5]See Memorandum Decision of the Superior Court (Appendix A), pp. A-113-117.

general election. All voters eligible to vote on the date of the new election should be entitled to vote, the candidates shall be limited to Hickel and Hammond in the Republican primary, and Merdes and Croft in the Democratic primary.[6] The court further directed that the general election, in any event, shall be held as presently scheduled with the names of all gubernatorial and lieutenant governor candidates not on the ballot if it is determined not practicable to complete the new primary and place the gubernatorial candidates on

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[6]Citing James F. Doherty v. Edward J. Mahoney, et al. and George K. Arthur, et al., 339 N.Y.S. 2d 641.

the general election ballot. The lieutenant governor was directed to certify to the court the suggested date for the general election for governor and lieutenant governor following the new primary election and to certify to the court the suggested date for the new primary so that appropriate orders may be entered.

From this judgment of the Superior Court both parties appealed, the main thrust of the present petitioners' appeal being that the Trial Court should have found malconduct in a number of instances where none was found and that certain ballots ordered counted should have been invalidated. Respondents herein, in their appeal, argued that the certification of the election should be upheld and that only Hammond and Croft and their

lieutenant governor running mate should be placed on the general election ballot on November 7, 1978. Respondents' request was in fact honored, just one short week after Judge Moody's decision, by the Alaska Supreme Court, Cheif Justice Jay Rabinowitz presiding.[7]

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[7]Petitioner Merdes had filed a challenge for cause against Justice Rabinowitz who refused to recuse himself. In so doing Chief Justice Rabinowitz and the court did not follow the procedures required by AS 22.20.020(c). Rather, the decision was made unilaterally and ex parte by Chief Justice Rabinowitz without referral to the court as required by the statute just cited. The "cause" alleged was contained in an affidavit submitted by the president of the Fairbanks,

In its Memorandum and Order (Appendix B) the Alaska Supreme Court reversed the decision of Presiding Superior Court Judge Moody; directed the gubernatorial election to be held on the scheduled date; set aside certain statutory requirements with respect to time tables to be followed in conducting a general election (without citing any authority for doing so); directed that only candidates Hammond and Croft appear as the

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(footnote continued for p. 36)

Alaska Chapter of the NAACP, one C. P. Jones, who swore that just prior to the August primary election he had been approached by Chief Justice Rabinowitz and importuned not to support candidate Merdes, with the inference that the Chief Justice had in his possession information derogatory to Senator Merdes.

nominees of the Republican and Democratic parties respectively; directed that the 247 "lost ballots" be counted; and ordered that other conceded or adjudicated irregular ballots be apportioned between the candidates on a mathematical or statistical formula based essentially on their prorated share of ballots which were either not contested or had been ruled to be valid by the Supreme Court. Under these circumstances the decision of the Supreme Court was tantamount to the selection of Alaska's next governor. Moreover, by their decision, the Alaska Supreme Court sanctioned, for future purposes of both State and Federal Elections, a number of practices which on their face appear to be clearly violative of Alaska's Constitution and election laws. Those laws

specifically enacted to prevent election fraud by prohibiting voters from concurrently voting in person in one state and casting an absentee ballot in another state were hamstrung. Thereafter, these petitioners moved for a rehearing (Appendix D) which was summarily denied. This Petition for Certiorari followed.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. This case squarely presents vital constitutional issues of national importance. Because of its geographical location, its land and resources, the State of Alaska is pivotal to many decisions affecting the future of the nation. To allow this crucial state, or for that matter any state, to elect its Chief Executive and its Representatives to the United

States Congress under circumstances and by means of a system or practice which condones and invites fraud and disenfranchises a large percentage of this still sparcely populated key state is unthinkable. The right to vote preserves all other rights.

Intercession by this Honorable Court to protect that most fundamental of all rights in a democratic society finds its precedent in a time honored case. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

This Court has previously held in Dunn v. Blumstein, 405 U.S. 330, 337 (1971) that when the right to vote is granted to some citizens and the franchise denied to others, "the court must determine whether the exclusions are necessary to promote a compelling state interest". As was sug-

gested in the brief to the Alaska Supreme Court, in the instant case, the State of Alaska cannot demonstrate that the exclusion of any voters was necessary to promote a compelling state interest.

Nevertheless, the effect of the interpretation of the mandates of the Alaska election laws by the Alaska Supreme Court is to systematically and cavalierly disenfranchis a substantial number of voters while concurrently allowing unqualified voters access to the ballot box. The statutory scheme enacted by the legislature patently proscribes such a result, yet the lip service paid to this scheme by the Alaska Supreme Court has the net effect of rendering the Election Statutes impotent.

The shocking defects of this election

have now been sanctioned by this state's highest court.

Although the United States Supreme Court has been extremely cautious in applying the guarantees contained in Article four, Section two to specific state actions, nevertheless it has announced the general principle that the distinguishing feature of the republican form of government vouchsafed to every state in the union by that clause is "the right of people to choose their own officers for governmental administration and to pass their own laws." Re Duncan, 139 U.S. 449 (1891). Likewise, this court has held that the purpose of Article IV, Paragraph 2, Clause 1 of the Constitution is to declare to the several states that they must grant to all citizens the same measure of rights afforded to

their own, not only not less, but also not more. Slaughterhouse cases (1873), 83 U.S. 36.

In the instant case, the rulings of the Alaska Supreme Court, if upheld, Alaskans, at least in federal elections, by opening the door to double voting on the part of non-residents. This practice is rendered especially pernicuous by the realities of seasonal fluctuations of transient population from other states within the state of Alaska, which every summer attracts many thousands of visitors, temporary employees, students and other non-residents, who, under the emasculated registration and absentee voting scheme remaining after the Alaska Supreme Court interpreted the Alaska laws as codified, would be not only allowed, but positively

encouraged to register during their brief sojourn, return to their homes, and assist their favorite cause in Alaska by mailing absentee ballots without fear of loosing their franchise in their own home states. Furthermore, the record in this case as a whole, and in many shocking specifics, involves violations of due process and the denial of the equal protection of the laws. It is clear that the federal guarantee of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government. Brinkerhoff-Faris Trust & Savings Co. v. Hill (1930) 281 U.S. 4th 673. In Rochin v. California, 342 U.S. 165 (1952) this court enunciated a "due process of law" test which, when applied to the manner in which

Alaska's highest court operated in this case, would invalidate its decision. Specifically, this court said that due process "requires in Rochin, supra, each case an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on detailed consideration of conflicting claims, and on judgement not ad hoc and apisodic, but duly mindful of reconciling needs both of continuity and of change in any progressive society" (emphasis supplied). And in Bowie v. Columbia, 378 U.S. 347 (1964) this Court said that a violation of the due process clause may be accomplished by the state judiciary in the course of its constuing an otherwise valid state statute. While this Court has repeatedly

held that the due process clause does not assure immunity from judicial erroe, it has also said, however, that it protects citizens against arbitrary government. Wolff v. McDonnell, 418 U.S. 539 (1974). The point where judicial error enas and arbitrariness, thinly disguised as rationalization begins, obviously is a question which should involve the exercise of independent judgement of this Court. The fundamental nature of the issues and the possible national implications referred to above, should militate strongly in favor of the exercise of that judgement in this case.

The following paragraphs are designed to discuss very breifly some of the many issues in which petitioners contend that the concept of judicial error has been transcended to the point of rationalizing arbitrary

government action as prohibited by the due process clause. The equal protection guarantee of the Fourteenth Amendment is even more apropos when it comes to discriminatory denial of the right to franchise and has been repeatedly applied in election cases. Dunn v. Blumstein, (supra), Lubin v. Panish, 415 U.S. 709 (1974), American Party of Texas v. White, 415 U.S. 767, reh. den. 416 U.S. 1000 (1974). Williams v. Rhodes, 393 U.S. 23 (1968).

2. The many instances of cavalier disregard of statutory mandates, the findings of the trier of the fact, and the constitutional and statutory scheme of the State of Alaska under which this joint state-federal election was conducted have been enumerated in detail in the preceding section dealing with questions presented.

This disregard consisted of such things as the Alaska Supreme Court substituting its judgment for the findings of the trial court, which were based upon testimonial and documentary evidence, that the primary election of August 22, 1978, was "so permeated with numerous serious violations of law***that substantial doubt will be cast on the outcome of the vote" and the substitution of the Alaska Supreme Court's own judgment for the prior resolution by the trial court of conflicting opinions of experts with respect to the validity of applying statistical methods to reconstruct the election and to determine the bias imparted to it by the malconduct determined to have occurred. The finder of fact found that no valid or credible statistical determination was possible, yet the

Alaska Supreme Court accepted the mathematical method rejected by the fact finder without holding those findings to be clearly erroneous or unsubstantiated by the evidence. This was contrary to established standards of appellate review and had the cumulative effect of resulting in an arbitrary selection by five men of the nominees for governor of the two major political parties in the State of Alaska. There was also reliance by the Alaska Supreme Court upon a number of facts unsupported by the record, e.g., a finding that possession of upwards of 2,000 ballots by a minor (one Taylor West) was "technically lawful under A.S. 15.55.050 and A.S. 15.16.010(13)", which statutes provide for lawful possession of ballots by "election officials", where the record

is uncontradicted that Taylor West could not be an "election official", since he was underage and the laws of the State of Alaska required all election officials to be qualified voters; again a finding that Taylor West's car in which those ballots were kept improperly had "remained locked during the entire time", when in fact the uncontroverted record showed that the car was unlocked at various times and while it was locked, another person had a key. Hence, it was totally improper for the Alaska Supreme Court to make a finding, contrary to that of a trial court, that "there was no evidence that the ballots had been disturbed or tampered with during the time that they were in West's custody." Also, the Alaska Supreme Court's failure to address the issue as to how certain

mutilated or missing ballots could be counted in a "recount", as well as of the fact that in the same recount otherwise mutilitated ballots were rejected. Specifically, in the case of two rural districts, Kwethluk and Kotlik, which delivered substantial majorities to the incumbent governor, the actual physical ballots, contrary to law, were destroyed or mutilitated and never transmitted for the state canvass, were nevertheless included in the count based upon so-called "certifications of the election result by local election officials", yet the record also indicates that numerous ballots which were mismarked or mutilitated, such as by erasers, double markings, etc., in favor of some of the respondent candidates, were disallowed by the Lt. Governor in the re-

count. This practice was affirmed by the Supreme Court, although in those very same cases their existed similar election certificates validating these ballots as part of the count as certified. Thus, there was patent and flagrant discriminatory treatment of ballots under identical circumstances, and although this matter was clearly brought to the attention of the Alaska Supreme Court, it simply ignored the issue. It also summarily overruled findings of fact, made by the trial court after hearing contradictory demeanor evidence and expert testimony, with respect to 247 questioned ballots from District 6, again without finding clear error. The conclusion that "the state had met its burden of proof, by a perponderance of the evidence, that the ballots were not the in-

strument of fraud, and that it was probable that they had not been tampered with" was totally unsupported by the record, which showed:

1. That these ballots had been misplaced in an unlocked file cabinet; that the general public as well as election workers for various candidates at various times had access thereto; that they could have been tampered with by anyone in a limited number of instances and by "an expert" with respect to substantially all of them; and that it was not possible for the expert examiners of questioned documents to say that they had "not been tampered with". Based upon this evidence, which consisted partially of demeanor testimony, the trial court concluded that these ballots were tainted and should not be counted. The Alaska Supreme

Court arbitrarily, and without even the most rudimentary attention given to the facts presented at the trial court, reversed this holding and ordered the ballots counted, thereby favoring the respondent candidates. The Alaska Supreme Court ignored the fact found by the trial court that no uniform regulations or standards were adopted by the Lt. Governor for cross-precinct and cross-district voting and that hence large numbers of voters were treated in a discriminatory fashion, were confused, and were discouraged from voting. The Alaska Supreme Court erred by making a totally arbitrary and factually unsupported assumption that the appellant candidates had waived the effects of what a majority of the Alaska Supreme Court conceded was illegal cross-district voting, when the

record clearly indicated and was brought to the attention of the court, that the very practice had been challenged by at least one of the candidates in the court and that other candidates observers were not allowed to challenge the validity of either absentee or questioned ballots at the state canvass, thus excluding the possibility of any waiver or estoppel. Likewise, the Alaska Supreme Court refused to deal with petitioners' contentions, supported by authorities, that the public's right to an honest election could not be estopped in any event and its statement that there is "no evidence of non-uniform enforcement sufficient to constitute malconduct" is wholly unsupported by the record and violated petitioners' constitutionally protected due process and equal protection rights.

2. The trial court found that Article V, Paragraph 1 of the Alaska Constitution mandates that only properly registered persons be allowed to vote. In furtherance of this mandate, the legislature has established guidelines for registration which require the applicant to furnish information regarding the applicant's residence, term of residence, and whether the voter has been previously registered in another jurisdiction. AS 15.07.060. In addition, the legislature has mandated that the Lt. Governor enter into arrangements with other jurisdictions to insure that Alaska's Voter Registration list is accurate. AS 15.07.065. The legislature has instructed the Lt. Governor to promulgate regulations to further the purposes of proper voter registration. AS 15.07.070(a).

The deposition of the Lt. Governor and key staff members, such as the Director of Elections, and the methods employed by election officials, as indicated by the findings, disclose a callous disregard of these statutory requirements. There has been only a perfunctory attempt to comply with AS 15.07.060. AS 15.07.065 has not been complied with at all. The Superior Court was not convinced by the proffered excuse that compliance would be too difficult or costly. Even assuming this to be true, the Lt. Governor had an affirmative duty to seek a more workable provision for insuring the accuracy of Alaska's voter registration list. In failing to follow the clear directive

of AS 15.07.065,[8] the Lt. Governor committed malconduct. The court could have later found that the legislature had adopted the

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[8]AS 15.07.065 might be conveniently cited here. It provides:

> "The Lt. Governor shall enter into reciprocal agreements or other arrangements for the exchange of voter registration information with the election officers and other jurisdictions to insure that the state's voter registration is accurate and up to date and to preclude a person from voting in Alaska and in another jurisdiction at the same election, thus preventing election fraud."

A clearer directive cannot be imagined. Yet, for three years the Lt. Governor and his staff totally ignored the legislative mandate and have still not complied with it, thus leaving the door open to wholesale election fraud in federal elections as well as state elections in Alaska.

comprehensive system of registration checks and balances in response to an earlier decision of the Alaska State Supreme Court invalidating the traditional one year residence requirement for new voters and substituting therefore, by judicial fiat, a 30-day period,[9] thus opening the door to

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(footnote continued from p. 58)

[9]State v. Van Dort, 502 P.2d 453 (Alaska 1972)

widespread abuses in a state in which every summer the ranks of the population are substantially swelled by large numbers of transients. Accordingly, it was deemed especially important that there be controls on double registration. These controls the Lt. Governor chose arbitrarily to ognore and not to enforce, although he had three years in which to make compliance with the legislative mandate, prior to the election in question. In light of the narrow margin between Hammond and Hickel, improper absentee ballots which were impossible to control due to the Lt. Governor's disregard of his official duties, likely exerted a decisive influence on the outcome of this election. An absentee ballot is the most vulnerable to individual abuse

which would explain why absentee voting is generally considered to be a privilege, not a right. The lack of controls, plus the emasculation of the statutes pertaining to the date checks of absentee ballots, must have biased the election outcome in favor of certain respondent candidates, contrary to the gratuitous assertions made by the Alaska Supreme Court in it's opinion.

To this inattention to duty by the Lt. Governor and the resulting opportunity for massive voter fraud, the Alaska Supreme Court lamely responded by saying that "although it might have been preferable for the Lt. Governor to have made efforts to enter into formal reciprocal agreements with other states where feasible (footnote 19: "It appears that very few states have a

central election officc." [The relevance of this comment is not clear since the statute does not limit the Lt. Governor to arrangements with"a central election office".] "***The record discloses that the Lt. Governor's staff routinely sends notices of cancellation of previous voter registration to other jurisdictions when informed by the applicants that they are registered voters of other jurisdictions.[10]

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[10]Emphasis supplied. The record also disclosed that this was the only item of information not required to be responded to in writing, but only informally and verbally inquired into; and that in many cases a so-called blue card (the cancellation notice referred to by the Supreme Court) was given to the applicant under some kind of honor

It also appears that at times the registrant is given the cancellation notice card and requested to forward it to the former voting jurisdictions. The record further demonstrates that Alaska regularly received information similar in character in return. Given the foregoing, we conclude that no basis exists for a holding that the Lt. Governor did not comply with the provisions of A.S. 15.07.065." To this the Alaska Court added a remarkable footnote No. 20 which reads as follows: "We note that the second stated purpose of A.S. 15.07.065 is not applicable to the situation of Alaska's primary. This latter purpose of the

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(footnote continued from p. 62)

system, to mail to his original jurisdiction. Clearly this is not what the legislature had in mind.

statute is intended to prevent persons from voting more than once in elections for national offices.*" It is thus apparent that the Alaska Supreme Court by its decision did not just happen to wipe out this important safeguard against election fraud in national elections innocently or by mistake, but with a clear understanding of its consequences! Having thus condoned the Lt. Governor's continued inaction, the doors are now wide open to precisely that kind of election fraud in Alaska in the 1980 national election. At that time Alaskans will be voting for President of the United States, for one United States Senator, and for a Member of Congress. Under the system now sanctioned by the Alaska Supreme Court, it will be quite feasible for hoards of transients, particularly those strongly motivated by

*Emphasis supplied

extremist political leanings and convictions, to come to Alaska as firefighters, park service volunteers, students, seasonal fishermen and tourists, to register in droves without voluntarily disclosing their existing registrations in such states as Washington, Oregon, California, etc. (since this information is not required to be placed on the forms supplied by the Lt. Governor) and then to return to their home states, enabled to vote Alaskan absentee ballots and yet still able to vote again in their own jurisdiction, with complete impunity, since it would be impossible under the system sanctioned by the Alaska court to trace, let alone prove, such widespread fraud. The Petition for Reveiw addressed to the Alaska Supreme Court and routinely brushed aside by that tribunal vainly implored:"since this holding leaves some

of the basic safeguards, applicable not only to state but also to national elections, in a total shambles, it is vitally important that this court reconsider this matter and give it the careful attention it most assuredly deserved." The same appeal, which is not based on fanciful imaginings but on the realities of close political elections, a common occurrence in the political history of our country, is therefore respectfully reiterated to this court as the only tribunal capable of rectifying this deplorable state of affairs.

3. With respect to Alaska's mandatory statutory requirements pertaining to absentee ballots, which had been flagrantly violated in the contested election in which admittedly many ballots had been counted which were either undated or date stamped after election

day, the Alaska Supreme Court, despite the fact that in at least one of the election contests the absentee ballots had been decisive, waved aside the objection by allowing the statutory requirements that absentee ballots be "marked on or before election day" to be satisfied by "the date of witnessing of the voter certificate". This substituted a voluntary "honor system", for what the legislature obviously intended to be at least a double check and probably a triple check against the anticipated temptation to vote an absentee ballot after election day, a temptation particularly strong when one's candidate appears to be losing by the narrowest of margins. This ruling leaves a gaping hole in the existing statutory safeguards with respect to both state and federal elections and requires

urgent consideration by this Court.

In another vitally important area, the Alaska Supreme Court allowed the legislative scheme for attempting to insure honest elections to become so riddled with loop-holes as to make a sham and mokery out of the entire procedure. Petitioners here refer to the recent, and frequently trouble-some innovation of using "punch card" bal-lots which are then counted by computers. To safeguard against the plethora of opportunities for seriously tampering with the integrity of this system, the legislature of Alaska had devised what it thought to be a nearly failsafe step-by-step mandatory scheme of checks, balances and controls. In the election which is the subject matter of this litigation, the Lt. Governor and the other state officials

in charge of the election machinery, subvert-ed these safeguards with an "early count", which by-passed numerous checks and controls; eliminated bipartisan reveiw; and destroyed the possibility of tallying ballots cast against persons registered as having voted in a given precinct. Not surprisingly, dis-crepancies between these two figures oc-curred in a substantial majority of all of Alaska's voting precincts during the election. In addition, the "early count" procedure otherwise violated a host of very specific and detailed regulations, clearly designed to avoid election fraud by those in charge of the machinery. Here again, the Alaska Supreme Court, apparently so satisfied with the results of the election as to be totally unconcerned about the means by which it was achieved, totally

ignores the fact that hence forward the entire legislative scheme and thus the security and validity of about half of all ballots cast in the State of Alaska are in critical jeopardy.

4. In its rush to judgment, the Alaska Supreme Court not only arbitrarily suspended mandatory time requirements in the Alaska election law, without so much as suggesting or hinting at the source of its authority to do so, but also chose to totally ignore petitioners urgent request that it consider important federal questions (which were also valid issues in the Alasks State Constitution set forth more specifically in Appendix E). As was suggested in the Petition for Rehearing this failure of Alaska's highest court to discharge its judicial responsibility "can

only be explained as a result of the pressures of time". Yet there existed no compelling reason, even if the court decided to overturn the trial court's determination that a new primary must be held because of cumulative malconduct, that the general election for governor of Alaska had to take place on November 7, 1978, desirable as that might be. Accordingly, to brush off so lightly, so many important basic issues, as did the memorandum opinion of the court, and, more importantly, to leave unprotected so many loopholes in a comprehensive legislative scheme to assure fair and honest elections (which the legislature must obviously have adopted in contemplation of the inherent "conflict of interest" arising from the delegation of supervisory and administrative duties to a partisan candidate for

statewide office) was not an adequate exercise of that profound judicial responsibility which rests upon the highest court of a sovereign state.

This urgent appeal, as has been shown, fell on deaf ears. It is respectfully hoped that upon its renwal to the highest tribunal in the country, it may be received and reveiwed with the earnestness and sincerity with which it has been presented.

CONCLUSION

For the reasons stated above, it is earnestly urged the writ prayed for should issue herein.

Respectfully submitted,

EDGAR PAUL BOYKO and

HENRY J. CAMAROT,

By: Edgar Paul Boyko

Edgar Paul Boyko

attorneys for petitioners

APPENDIX A

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

WALTER J. HICKEL, a candidate for the office of Governor (Republican Primary),

Plaintiff,

vs.

LOWELL THOMAS, JR., Lt. Governor of Alaska, et al.,

Defendants.

EDWARD A. MERDES, a candidate for the office of Governor (Democratic Primary),

Plaintiff,

vs.

LOWELL THOMAS, JR., Lt. Governor of Alaska, et al.,

Defendants.

Nos. 3AN78-6243 & 3AN78-6248 (Consolidated)

MEMORANDUM DECISION ON PLAINTIFFS' AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This is an election contest filed by two candidates in the gubernatorial contest held on August 22, 1978.

One of the plaintiffs, Walter Hickel, a Republican candidate, was defeated by Republican Governor Jay Hammond by 98 votes. There were two additional Republican primary candidates who have not joined in this action or have filed a disclaimer of interest in the action.

The other plaintiff, Edward Merdes, a Democratic candidate in the primary, lost to Democratic candidate Chancy Croft by approximately 270 votes, according to the complaint. In addition

to Merdes and Croft, there was one other Democratic candidate.

Approximately 108,000 votes were cast in the election.

Registered voters were as follows:

64,452	Democrats
33,837	Republicans
5,788	Other Parties
120,465	Non-Partisans
224,542	Registered Voters in August 1978

(Lt. Governor Press Release, dated August 10, 1978; Defendants' Reply at 116.)

In addition to the candidate parties to this suit, Lt. Governor Lowell Thomas, Jr., who is charged by law with the duties of administering elections, is a party-defendant, as is Octavia Hansen, Achorage Elections Supervisor, and Patty Ann Polley, Elections Director.

The allegations of plaintiffs alleges malconduct, fraud, or corruption on the part of election officials sufficient to change the result of the election.

The state and all defendants deny all the allegations and claim the election was well conducted, with only minimal mistakes and error as might be expected in any election contest of this magnitude.

This matter is before this court at this time on cross-motions for summary judgment by the plaintiffs and defendants.

In this context, the court can make definitive findings of fact and conclusions of law and render its decision only as to those material facts

which are not in dispute. All matters in dispute which raise material issues of fact could be tried at a later time.

The parties have filed a stipulation of facts as follows:

The parties to this action agree to the following summary with respect to votes cast in the August 22, 1978, primary election.

I. IRREGULARTIES CONCEDED BY ALL PARTIES

1.	Unregistered voters allowed to vote	57 (includes 2 (absentees)
2.	Wrongfully cast shut-in votes	2
3.	Person voting twice (absentee)	1
4.	Improperly counted absentees (not included above)	35

5. Registered voters wrongfully denied franchise 2/97

II. QUESTIONED BALLOTS IN CONTENTION

1. The number of cross-district questioned ballots counted = 1,881

2. The number of cross-precinct questioned ballots within the same district counted = 1,941

3. The number of question-ballot envelopes with form discrepancies = 365

The form question envelopes in subsection 3 overlap with the cross-precinct and cross-district ballots set forth in subsections 1 and 2.

III. ABSENTEE BALLOTS IN CONTENTION

1. Absentee ballots with no postmark and no date stamp witnessed on or before August 22.

a. Witnessed by election official 1,068*

b. Witnessed by other people 403*

Total: 1,471

2. Absentee ballots with no postmark and date stamped in at the Division of Elections on August 23rd and witnessed on or before August 22.

a. Witnessed by election officials 305*

b. Witnessed by other people 210*

Total: 515

3. Absentee ballots with no postmark and date stamped at the Division of Elections on August 24 or later and witnessed on or before August 22.

a. Witnessed by election officials 142*

*/ These individual numbers were not independently verified by the Hickel-Merdes discovery team. However, they are willing to accept them as true for purposes of this lawsuit.

b. Witnessed by other people 43*

Total: 165

4. Personal representative pipeline and North Slope ballots counted

a. No postmark, no date stamp by Division of Elections, but witnessed on or before August 22. 156*

b. No postmark, date stamped August 24, but witnessed by other on or before August 22. 2*

c. Postmarked or date stamped by August 22. 212*

Total 370*

5. Envelopes with miscellaneous form problems. 122

6. Miscellaneous date problems

a. Witnessed by election officials 22*

*/ See fn * at __.

b. Objective date problems which the State contends are legally explainable 5*

Total: 27*

7. Number of counted absentee ballots with envelopes with the signature of one witness only = 8,947

In addition, literally hundreds of affidavits have been filed, as well as numerous depositions, which will be considered. A number of affidavits were filed previously by plaintiff which were unsigned at the time of filing, which have not subsequently been signed within the time frame allowed by the court. The purported facts in those affidavits have been disregarded by the court in its consideration of these motions for summary judgment.

/ See fn at __

Extensive briefs and charts have been furnished by the parties and oral argument made by all parties. The plaintiffs seek to set aside the certificates of defendant-candidates' election as primary nominees of their respective parties and have the court order a new election. The court is ignoring all the rhetoric, allegations, accusations, and exaggerations of all the parties that are usually associated with a long and bitter primary election campagin, with only a few votes separating the parties. The issues, as the court views the pleadings and undisputed material facts, will be dealt with separately for purposes of brevity and clarity, if that be possible.

FINDINGS OF FACT

A. Prudhoe Bay Absentee Voting by Personal Representative.

(1) The Lt. Governor did not perceive a need to establish an election district in Prudhoe Bay because it was felt these persons were registered in other parts of the state. (Deposition of Patty Ann Polley, pp. 153-165.)

(2) Alaska Teamster Local 959 of the International Brotherhood of Teamsters is a statewide union organization.

(3) Mr. Jefferson B. Barry is a business representative for Alaska Teamsters Local 959, and Director of Alaska Labor Independent Voter Education (A.L.I.V.E.). (Deposition of Jefferson Barry, p. 2.)

(4) Mr. Richard Carrington is

a business representative for Alaska Teamsters Local 959. (Affidavit of Richard Carrington, p. 2. Note: This affidavit is timely filed and signed, but is not notarized.)

(5) Mr. Jack Wehner is a "business agent in Fairbanks" for Alaska Teamsters Local 959. (Deposition of Jefferson Barry, p. 16.)

(6) Based upon a poll of the membership, the Executive Board [sic] of Alaska Teamsters Local 959, consisting of at least the President, Vice-President and Secretary-Treasurer, decided to support candidate Hickel in the primary. (Deposition of Jefferson Barry, p. 12.)

(7) The Hickel campaign organization was cognizant of this support by the Teamster leadership (Deposition of

Jefferson Barry, pp. 24, 27; Deposition of Mead Treadwell, p. 97.) (8) Richard Carrington obtained applications for absentee ballots from the Fairbanks election office for persons working and staying in Prudhoe Bay to vote by personal representative. (Affidavit of Richard Carrington, p. 2.)

(9) The application form supplied contained a certificate that the applicant was physically disabled. Upon inquiry, the personal representative was told by election officials in Fairbanks to use the form. (Affidavit of Richard Carrington, p. 4.)

(10) Mr. Carrington and Mr. Wehner went to Prudhoe Bay and approached Teamster Union members. (Affidavit of Richard Carrington, p. 8.)

(11) 532 voters were issued absentee ballots based upon these forms. (Affidavit of Anne Speilberg I, Appendix to State's Motion for Summary Judgment, p. 60, para. 21.) The voted ballots were returned to election officials by Richard Carrington. (Affidavit of Richard Carrington, p. 11.)

(12) In fact, none of the voters was physically disabled. (Affidavit of Richard Carrington, p. 8.)

(13) These votes were counted separately after being challenged and segregated. (Affidavit of Lowell Thomas, Jr., Appendix to Defendant's Reply Memorandum, p. 150, para. 3-9.)

(14) A person connected with the Merdes campaign staff contacted the Teamster business representative in

Fairbanks prior to the count of those ballots to establish that Teamster representatives had collected absentee votes by personal representative from the North Slope area. (Deposition of Jefferson Barry, pp. 33-37.)

(15) Before the absentee ballots were counted, the Teamster business representative informed Hickel campaign staff that the Teamsters were responsible for approximately 1,000 absentee votes. (Deposition of Jefferson Barry, pp. 30-31.)

(16) Plaintiff Hickel has denied having knowledge of the absentee ballots cast by personal representatives on the North Slope. (Defendants' Request for Admissions.)

B. Discrepancies Between Number of Ballots Cast and Number of Signatures on Register.

(1) Prior to the election, election officials were given instruction and training regarding the keeping of voter registers at the polls. (Affidavit of Patty Ann Polley, State's Appendix at 11.) Three registers were to be used. These were the main original register, the duplicate register, and the questioned voter register. (Affidavit of Wilson L. Condon, State's Appendix at 104.)

(2) The regular procedure to be followed on election day was that a voter would sign his or her name to the main original register upon entering the polling place. The election official

would then check the name against the duplicate register, which consisted of a computer printout listing the names of all registered voters in that precinct. If the voter's name appeared on the duplicate register, he was given a regular ballot and allowed to vote. (Affidavit of Wilson L. Conson, p. 105.)

(3) If the voter's name was not on the duplicate register, election officials were instructed to place the person's name on the questioned voter register which, depending on the precinct, consisted either of a separate register book or a section at the back of the main original register. In addition, there was a space on the back of the envelope containing the duplicate register which could be used to list questioned

votes. (Affidavit of Wilson L. Condon, p. 105.)

(4) In some precincts, a slightly different procedure was followed under which voters were asked their names and checked against the duplicate register before they signed the main original register. If the voter's name was not on the duplicate register he or she was asked to sign the questioned voter register only.

(5) This system of keeping voter registers was not followed completely during the election. In some instances, questioned voters were allowed to sign the main original register instead of the questioned voter register. In other instances, a questioned voter's name was added by hand to the duplicate

register. In some instances, voters received ballots without signing any register at all. (Affidavit of Patty Ann Polley, State's Appendix at 31; Affidavit of Wilson L. Condon, pp. 108-109.)

(6). These and other miscellaneous errors in following the proper register procedure resulted in apparent discrepancies between the number of names on the various registers and the number of corresponding ballots cast. (Affidavit of Tim Downs; Deposition of Octavia Hansen.)

(7) As a result of a statewide audit of the ballots conducted by the elections division, all but approximately 80 of the apparent discrepancies have been resolved. Fifty-seven unregistered voters were allowed to cast ballots that

were counted. (Affidavit of Wilson L. Condon; 2d Affidavit of Wilson L. Condon.) The parties have also stipulated to other minor irregularities. (See Stipulation of Facts -- irregularities conceded by all parties.)

C. Voter Registration.

(1) Fifty-seven (57) unregistered voters improperly cast ballots and two properly registered voters did not have their ballots counted. (Stipulation of the parties.)

(2) Voters observed other voters registering to vote and voting on election day. (Affidavits of Pat Edwards and Pamela Thiel.) However, the registrations were not processed and voters were required to vote questioned ballots. (Affidavits of Patty Ann Polley, Appendix

to State's Motion for Summary Judgment, pp. 42, 51.)

(3) James D. Stanley registered to vote and voted on August 22. (Affidavit of James Stanley.) His ballot was a questioned ballot and was not counted because he was improperly registered. (Affidavit of Thomas Bergstrom.)

(4) Various affiants stated that they were properly registered but were not allowed to vote. (Affidavits of Gary Kincaid, Marjorie Berg, F. E. Schalk, Lloyd Johnson, Shirley Lotz, Jody Wilcox, Elmer Williams, and Janet Otcheck.) State registration records show that these voters were either not properly registered for purposes of the August 22nd primary, or had been properly purged. (Affidavit of Patricia Ann

Polley, State's Reply Appendix, pp. 112-113.)

(5) Fourteen (14) voters attempted to vote under married names when they had been registered under their maiden names. Their votes were rejected. (Affidavits of Ellen Jean Hester, Linda Swenson, and Bennie Leonard/William Morris.)

(6) In Alaska, all persons who wish to register to vote are asked whether they are registered elsewhere. If an affirmative answer is given, a notice of cancellation is sent to the other state. Alaska routinely sends these notices to other states and receives them from other states. There is, however, no acknowledgement on the part of the receiving state that the

registration in that state has, in fact, been cancelled. (Affidavit of Patty Ann Polley, State's Appendix, pp. 41-42; Deposition of Patty Ann Polley, pp. 95-109.) If a person answers in the negative when asked if he/she is registered in another state, no further investigation is undertaken to verify the negative answer. (Deposition of Lowell Thomas, Jr., p. 68.)

(8) [sic] The Lt. Governor has entered into no formal interstate agreements for exchange of voter registration information. (Deposition of Lowell Thomas, Jr., pp. 61-72.)

D. Improperly Marked Ballots

(1) During the election recount, paper ballots were counted which were not marked with an "x", a check, or

a cross. In addition, punchcard ballots with punches occurring either above or below the candidates name were counted where the voter's intent appeared clear and no other punches were found on the ballot. This was done in reliance on the determination of Lt. Governor Lowell Thomas, Jr., as well as on an opinion from the Department of Law. (Deposition of Patty Ann Polley, p. 122 and pp. 336-344.)

(2) Plaintiffs' affidavits indicate that in excess of 150 improperly marked ballots, both paper and punchcard, were counted. (Affidavits of Tim Downs, exhibit 17; Robert Hartig, exhibit 32; Edgar Paul Boyko, exhibit 9.)

(3) Plaintiffs' exhibit A indicates that 658 ballots were

challenged for improper marking. Of these 658, 255 appeared to be cast for Hickel, 58 for Croft, 197 for Merdes, and 238 for Hammond.

E. Cross-District and Cross-Precinct Voting

(1) 1,881 ballots cast outside the voter's district of residence were counted in the general canvass and recount. 1,941 ballots cast outside the voter's precinct of residence were counted in the general canvass and recount. (Stipulation of Facts.)

(2) Since 1968, it has been the general policy of state election officials to allow persons outside their home district or precinct to cast a questioned vote, and then count the ballots if the perons are properly

registered. Allowing cross-district voting has been the practice of the Division of Elections at least since the 1972 general election. (Deposition of Lowell Thomas, Jr., pp. 289-90; Affidavit of Patty Ann Polley II, para. 4.)

(3) The enforcement of the policy of allowing cross-precinct voting within the southcentral region was left to the discretion of local election officials. (Deposition of Octavia Hansen, pp. 221-224.)

(4) A press release dated August 10, 1978, by Lt. Governor Thomas encouraged absentee voting for those away from their "home communities." A press release dated August 17, 1978, two days after the deadline for absentee ballot requests, recommended voting at a

regional election office if a voter was away from his precinct and wanted to vote a district-wide ballot; if "out-of-town" the voter could vote a questioned ballot for statewide offices in any precinct or district. (News Releases of August 10, 1978, and August 17, 1978.)

(5) The instructions to voters available at the polls indicate that any registered voter may vote on election day, but that a voter may vote in person on election day only at the polling place designated for the precinct of his residence. (Instructions to Voters in State Election, Form E-8.)

(6) Election officials were instructed to permit voters to vote a questioned ballot if their names did not appear on the precinct register.

Officials were instructed to urge voters to vote in the precinct or district of their residence. (Instructions to Election Boards; Affidavit of Betty Irvine II, para. 3.)

(7) Approximately 10 persons were advised by election officials of Precinct 24, District 10, in Anchorage, to go to their own polling places. Some of these voters insisted on voting in Precinct 24 based on their belief that election officials on the radio had said they could vote in any precinct. (Affidavit of Gertrude Wells, para. 3-5.)

(8) Approximately 20 persons were advised by election officials in Precinct 139, District 8, in Anchorage, that they should go to their own precinct

to vote. Very few of these persons insisted on voting in Precinct 139. (Affidavit of Oscar Geravitis, exhibit 64.)

(9) Approximately six persons were advised by election officials in Precinct 149, District 8 in Anchorage that they should go to their own precincts to vote. (Affidavit of Dorothy F. Fetrow, exhibit 20.)

(10) Approximately 50 persons were advised by election officials of Precinct 121, District 12 to go to their own precinct to vote. Many of these persons insisted on voting a questioned ballot based on their belief that election officials had said on the radio that they could vote in any precinct. This information was contrary to

instructions given to election officials by Octavia Hansen. (Affidavit of Pauline Mae Farr, exhibit 19.)

(11) Approximately 45 persons were advised by election officials in Precinct 24, District 10 in Anchorage they they should go to their own precincts to vote. Many of these persons insisted on voting a questioned ballot based on their belief that election officials on the radio had said that they could vote in any precinct. This belief was contrary to instructions given to election officials by Octavia Hansen. (Affidavit of Phyllis D. Fisher, exhibit 21, para. 3-6.)

(12) Approximately 10 persons were advised by election officials in Precinct 12, District 7 in Anchorage that

they should go to their own precinct to vote. Many of these persons insisted on voting questioned ballots. Two persons registered in Ketchikan and now living in Anchorage declined to re-register in Anchorage and were allowed to vote challenged ballots. (Affidavit of Hazel Gallagher, exhibit 25.)

(13) During the canvass, representatives for the plaintiff-candidates Hickel and Merdes were present during the counting of cross-district and cross-precinct questioned ballots. (Affidavit of Patty Ann Polley, dated October 6, 1978; Director, Dvision [sic] of Elections with exhibits A, B, C, d (response to Mead Treadwell letter) at 69 of Appendix to State's Reply Memorandum; see Merdes v.

Thomas, Superior Court No. 3AN 78-5816. Mr. Mead Treadwell of the Hickel for Governor Committee, in a letter dated September 7, 1978, the day before the completion of the canvass, requested Ms. Polley to count certain ballots which were cross-district and cross-precinct questioned ballots. (See Affidavit of Patty Ann Polley, supra, exhibit A, p. 76.)

F. Ballot Security

a. The Ballots from Kotlik

(1) The 37 ballots cast from the Kotlik precinct were never received by the state canvass board or the Lt. Governor for use in the recount.

(2) While the certificates, tallies, registers and unused ballots

were sent to the Lt. Governor, the ballots that were used in the primary election were not, but were destroyed by the chairman of the precinct's election board.

(3) Prior to these ballots being destroyed, the voting results were reported to the election office by telephone and subsequently by certificate on the cases of the tally book.

(4) At the recount, Lt. Governor Lowell Thomas, Jr., certified the results of the Kotlik vote based on the original count although the ballots were not physically present at the time of the recount.

(5) Since the recount, the Attorney General's office and the Ombudsman have conducted investions of

the disappearance of these ballots. Thirty-five of these ballots were recovered from the Kotlik town dump during the investigation.

(See: Affidavit of Jo Ann Crane, App. pp. 81, 82; Affidavit of Christopher Aketachunak, Appendix p. 84; Affidavit of Mead Treadwell, exhibit 61 g.)

b. The Ballots from Kwethluk

(1) The 104 ballots cast from the Kwethluk precinct were never received by the state canvass board or the Lt. Governor for use in the election recount.

(2) While the certificate, tallies, registers, and unused ballots were sent to the Lt. Governor, the ballots that were used in the primary

election were not, but were destroyed by the chairman of the precinct's election board.

(3) Prior to these ballots being destroyed, the voting results were reported to the election office by telephone and subsequently by certificate on the cases of the tally book.

(4) At the recount, Lt. Governor Thomas certified the results in the Kwethluk vote based on the original count, although the ballots were not physically present at the time of the recount.

(5) Since the recount, the Attorney General's office and the Ombudsman have conducted investigations of the disappearance of these ballots.

These investigations led to the recovery of the tops of 78 ballots and the bottom of all 104 ballots cast in Kwethluk on election day. (See Affidavit of Jo Ann Crane, Appendix, pp. 81, 82; Affidavit of Jo Ann Crane, Reply, p. 16; Affidavit of Alfred M. Nicolai, Reply, p. 42; Affidavit of Mead Treadwell, exhibit 61 C.)

c. The 247 Ballots in Anchorage

(1) 247 questioned ballots from the District 6 election office were misplaced by election officials on the day of the election, August 22, 1978.

(2) While in the process of reviewing election materials from Election District 6 on September 23, 1978, and after certification of the

defendant as nominees, Assistant Attorney General Ivan Lawner discovered that these ballots were missing.

(3) After consulting with the Director of Elections, Patty Ann Polley, and the Anchorage Election Supervisor, Octavia Hansen, Mr. Lawner concluded that the 247 missing questioned ballots could not have been counted at any time.

(4) At approximately 9:00 p.m. on September 23, Mrs. Vivian Bagley, an Anchorage election official, found the 247 ballots unopened in a cabinet that was unlocked in the election office and had been unlocked during the entire period from August 2, [sic] 1978, until found on September 23, 1978. Shortly thereafter, the 247 questioned ballots

were placed in the custody of the State Troopers.

(5) These ballots are now before this court as exhibit 1 and have been examined by document experts of both plaintiffs and defendants. Both experts concluded that the ballots probably have not been tampered with, but were unable to conclusively say that they were not tampered with. (Deposition of Octavia P. Hansen, pp. 10-46; Affidavit of Ivan Lawner, Appendix, p. 302; Affidavit of Jan Beck; Testimony of Jan Beck; Testimony of Mr. Harris.)

d. The Taylor West Affair

(1) Mr. West was employed by the Division of Elections from June 12 to

August 29, 1978, as a full-time elections clerk.

(2) On the evening of August 22, 1978, Mr. West was working in the computer counting room at 5700 Tudor Road, Anchorage.

(3) As a portion of his duties on that evening, Mr. West loaded two large paper bags constituting approximately 2,000 questioned ballots into a vehicle at approximately 10:00 p.m., along with other election materials, leaving them in the car until he drove to his residence in said vehicle.

(4) After arriving at his residence, Mr. West locked his vehicle, which he left on the street unguarded,

and went into his residence where he remained for the entire evening.

5. When Mr. West returned to the vehicle the following morning at 7:00 a.m., the vehicle was still locked, and its contents appeared to him to be undisturbed.

(6) That morning, the ballots were again left in the locked vehicle, unguarded, in the rear of the elections office until Mr. West unloaded them and delivered the ballots to the Anchorage elections office.

(7) There is no evidence that the ballots were disturbed during the time they were in Mr. West's custody. (Affidavit of Taylor West, Appendix, p. 6.)

e. The Bag of Ballots Found in Juneau on September 29.

(1) On September 16, during the recount of ballots, Mr. Mead Treadwell, a Hickel representative, requested that the recount include a review of previously rejected questioned ballot envelopes because of possible inaccuracies in the statewide master register when these envelopes were initially rejected.

(2) On September 18, all rejected questioned ballots were checked against the statewide register and some 80 were found to be allowable.

(3) In the presence of all parties, the envelopes were opened and the ballots were removed and counted.

(4) The opened envelopes were then segregated and transported to the holding cell in the bottom of the Juneau courthouse, where all election materials were secured.

(5) When in the cell, they were eventually put in a brown paper bag so as to isolate them from the rest of the materials.

(6) On September 29, Mr. James Thompson noticed the bag on the floor while examining elections materials for the Hickel people.

(7) When seeing the bag and checking the contents, Mr. Thompson did not understand their meaning and became suspicious of commingling and counting of improper ballots. (Affidavit of Patty Ann Polley; Affidavit of Robert M.

Maynard; Affidavit of James L. Thompson.)

f. Miscellaneous Irregularities

(1) There were a substantial number of other allegations regarding insufficient security during transportation of ballots from polling places to the computer center, during the counting process at the computer center, and thereafter, during transportation of questioned ballots and ballots to be facsimilied. Based on the affidavits of all parties, this court finds that the evidence does not support a finding of insufficient election security, although there are indications of lax security. (Affidavit of Sonya Younkers; Affidavit of Hess Ragins; Affidavit of Anne Speilberg, Reply 64 & 65; Affidavit of

Bennie Leonard and William Morris; Affidavit of Mary Coffey; Affidavits of Patty Ann Polley, Reply 148; Affidavit of Loren B. Mahnke; Affidavit of Richard O'Neil; Affidavit of Claudia Pierce; Affidavit of William Johnson; Affidavit of Betty Irvine; Affidavit of Betty Blake; Affidavit of Frank Morris; Affidavits of James Thompson; Deposition of Lowell Thomas, Jr., pp. 121, 259-60; 279-80, 348-360; Deposition of Patty Ann Polley, pp. 36, 40-41, 54-57; Deposition of Octavia Hansen, pp. 47-49, 55-62, 80-82; Affidavits of Mead Treadwell, exhibits 61D, 61E, and 61F.)

G. Absentee Ballots

(1) Absentee ballots for in-person voting were sent out to the regional election supervisors and

distributed by them to all local election officials before August 7, 1978, the date mandated by statute (A.S. 15.20.040). (Affidavit of Octavia Hansen I, Appendix 56, para. 15-16; Affidavit of Patty Ann Polley II, Appendix 52, para. 7; Affidavit of Anne Speilberg I, Appendix 61, para. 14; Affidavit of Jo Anne Crane I, Appendix 67, para. 15.)

(2) All applications by mail for absentee ballots, that were postmarked on or before August 14, 1978, and received by August 21, 1978, were granted in accordance with the mandate of A.S. 15.20.100. All absentee ballots were sent out no later than one day following the receipt of the application. There was no failure or refusal to mail out ballots timely requested. (Affidavit

of Patty Ann Polley II, Appendix 52, para. 8-10.)

(3) The existence of the following facts has been stipulated to by all the parties and are now entered as part of these Findings of Fact.

(a) 9,172 absentee ballots were counted in this primary election.

(b) 1,471 absentee ballots, witness dated on or before August 2, 1978, had no postmark or date stamp. Of that number, 1,068 were witnessed by an election official, with the other 403 witnessed by other persons.

(c) 515 absentee ballots, witness dated on or before August 22, had no postmark but were date stamped in at the Division of Election on August 23.

Of that number, 305 were witnessed by election officials, with the remaining 210 witnessed by other persons.

(d) 165 absentee ballots, witness dated on or before August 22, had no postmark and were date stamped at the Division of Elections on August 24 or later. Of that number, 142 were witnessed by election officials, with the remaining 43 witnessed by other persons.

(e) 122 absentee ballots had miscellaneous form discrepancies.

(f) 27 absentee ballots had miscellaneous date problems. Of that number 22 were witnessed by election officials, and five had objective date problems that the state contends are legally explainable.

(g) 35 absentee ballots were improperly counted.

(4) 479 absentee ballots, from Districts 16, 19, and 20 were hand dated by election officials on August 22 or before, due to a breakdown in the date stamp for that office. (Affidavit of Anne Speilberg, Reply, p. 156-57; Affidavit of Maureen K. Backstrom, Reply, p. 146-147; Affidavit of Joseph K. Donohue, Reply, pp. 160-164.)

(5) One ballot that bore a late postmark was counted, because the local canvass board believed that the witness date of August 22 indicated that the ballot was cast that day on board a ship, and that the postmark occurred on the landfall of the ship in Seattle,

Washington, on August 22. (Affidavit of Mary Jo Hobbs, Appendix 92.)

(6) One absentee ballot from District 18 that bore a late postmark was counted, becaue it was returned to the election official on August 22 by a personal representative, and was transmitted by mail the next day to the election supervisor in Nome (Affidavit of Jo Anne Crane, Appendix 90, para. 4.)

(7) Six absentee ballots from District 17 that bore a late postmark were counted as it was felt the ballots were cast on time in front of an election official, but that the postmark indicated a later date of transmittal. (Affidavit of Jo Anne Crane, Appendix 90.)

(8) That up to 25 percent of the absentee ballots were not postmarked,

due to postal employees erroneously mistaking the envelopes for another type of envelope not requiring a postmark. (Affidavit of L. J. Jackson, Reply, p. 36, para. 6.)

(9) The parties have stipulated that 8,947 absentee ballots with one witness signature were counted.

H. Miscellaneous Irregularities

(1) Individual voters were not required to produce identification when they signed the voting register to vote. (Deposition of Octavia Hansen, pp. 56-57; Affidavit of Virginia Ryden.)

(2) During the counting of absentee and challenged ballots on August 25, at least two tally sheets were

destroyed. (Affidavits of Louise Bell, Helen Buker.)

(3) During the opening of absentee ballot envelopes, the automatic letter opening machine accidentally sliced some ballots in half, which were taped back together by the canvass board and volunteers so that the ballots would not be separated. (Affidavits of Avis Terhune, Betty Irvine, and Betty Blake.)

(4) One voter received two sets of conflicting instructions when he received his absentee ballots, but when he called Anchorage election headquarters, he was given proper instructions for sending in his ballot. (Affidavit of Bill Moulton.)

(5) One individual was found to be simultaneously registered in two locations. (Affidavit of Bucki Wright.)

(6) There were several instances of multiple register entries in what appeared to be identical handwriting, some of which were caused by poor carbon copies or a defective pen. (Affidavits of Gerald Hood, Robert Hickel, Timothy Sam.)

(7) Approximately four persons requested absentee ballots by mail, but either received no ballots or received ballots too late to vote them. Election records show these persons were either mailed absentee ballots as requested or given reasons why they did not qualify for absentee ballots. (Affidavits of Dick Green, Jesse R. Lee, Martinson Pete

Kaniho (not sworn), Johnnie Pugh; Affidavit of Patty Ann Polley, Reply, Appendix, pp. 141-142.)

(8) At least four persons believing themselves to be properly registered were told their names were not on the computer printout, and either did not vote or voted questioned ballots. (Affidavit of George Gould, Allen Aldrighette, Robert Hooper, and F. E. Schalk.)

(9) Two properly registered voters were denied the right to vote. (Stipulation of the parties.)

(10) 365 questioned ballot envelopes containing form discrepancies (no election officials' signature, no voter signature, no date or voter signed

as election official) were counted. (Stipulation of the parties.)

(11) 57 unregistered voters were allowed to vote, and their votes were counted. (Stipulation of the parties.)

I. Punchcard Balloting

a. Juneau Computer Breakdown

(1) On election evening, the State of Alaska, Department of Administration computer was designated to process punchcard ballots from the Juneau district. (Affidavit of David L. Van Wieringen, p. 76.)

(2) Shortly after processing began, problems developed with this computer. It was decided by the Data Processing Review Board that the

Department of Labor computer, located in the same room, should be used instead. (Affidavit of David L. Van Wieringen.)

(3) Processing was begun on the Labor Department computer, and eight precincts were tallied before this computer also developed problems. By that time, the problems with the Department of Administration computer had been corrected. The Data Processing Review Board decided to complete the Juneau tally on that computer. This was done and calculation of the totals was completed using the summary cards and reports from both of the computers. (Affidavit of David L. VanWieringen.)

(4) There is no indication that these calculations or the final totals were incorrect or inaccurate.

(5) During the processing, several punchcards were determined to be non-processable. Two of these punchcards were marked in ink rather than punched. They were placed in envelopes and set aside. Later, the Data Processing Review Board decided to punch these ballots and count them instead of preparing facsimile ballots. They were punched, processed, and added to the totals. (Affidavit of David L. VanWieringen.)

(6) In addition, one absentee ballot for another district was rejected by the Juneau computer. This ballot was given to the elections supervisor and later hand counted. (Affidavit of David L. Van Wieringen; Affidavit of Mary Jo Hobbs, p. 85.)

(7) As required by statute, the election supervisors of the various election regions appointed members to Data Processing Review Boards, receiving boards and control boards. The evidence indicates that there may have been technical violations of the statutes regarding the number of computer specialists required on the review boards. (See Affidavit of Anne Speilberg, p. 61; Affidavit of Mary Jo Hobbs, p. 66), and failure to consult the district committees of the political parties. (Deposition of Octavia Hansen, p. 112.)

b. Different Rules Between Recount and Election

(8) When being processed by computer, ballots with punched spaces

above or below the proper space next to the candidate were not counted. At the subsequent recount, it was decided to count these ballots. (Affidavit of Patty Ann Polley, pp. 43-49.) The computer also counted two ballots voted with double punches. These were later considered improper and were excluded in the recount. (Affidavit of Mead Treadwell, exhibit 61(d).)

c. Early Count

(9) Regulations were promulgated through the Lt. Governor's office that provided for an early 4:00 p.m. pickup of computer punchcard ballots in Anchorage, Fairbanks, and Juneau. (Deposition of Lowell Thomas, Jr., pp. 79-80.) These procedures were used in Anchorage and Fairbanks. (Deposition of

Patty Ann Polley, pp. 50-51.) At the early pickup, the ballot boxes were sealed, clearly identified with the precinct name, and custody taken by a delivery team who prepared a receipt in exchange. (Deposition of Octavia Hansen, pp. 50-51.) A.S. 15.20.640 provides certain additional procedures with respect to the handling and pickup of such ballots. These security procedures were not followed in the case of the early pickup. (Deposition of Octavia Hansen, pp. 52-53, 145-146; Deposition of Patty Ann Polley, pp. 54-55; Deposition of Lowell Thomas, Jr., p. 91.)

CONCLUSIONS OF LAW

A defeated candidate may challenge the election process on the grounds of "malconduct, fraud, or

corruption on the part of an election official sufficient to change the result of the election." A.S. 15.20.540. This is a two-part test, generally requiring a separate determination as to improper conduct and then as to the effect on the outcome. Though the plaintiff has alleged fraud and corruption in this action, the court finds non present in the record. Therefore, it is necessary to establish an appropriate standard of malconduct against which the evidence is to be weighed before any relief can be granted.

Even though every reasonable presumption in favor of the validity of an election must be indulged (Turkington v. City of Kachemak, 380 P.2d 593, 595 (Alaska 1963)), if there is a

"significant deviation from a prescribed" norm which could have affected the result of the election, malconduct has been shown and a new election may be ordered. Boucher v. Bomhoff, 495 P.2d 77 (Alaska 1972). This is "more than a lack of total and exact compliance" with appropriate standards. Boucher v. Bomhoff, supra.

It has not been determined in this jurisdiction whether the act of malconduct by an election official requires a bad frame of mind, or an element of scienter, such that the conduct would be subject to prosecution under chapter 55 of Title 15. However, A.S. 15.20.540 was derived from the laws of New Jersey and Ohio. See Memorandum, Alaska Legislative Council, January 20,

1960, §4.81. Alaska courts have referred to the courts of the state of origin of a statute for guidance in statutory construction. See Gray v. State, 463 P.2d 897, 902 (Alaska 1970). In this regard, the New Jersey statute most closely parallels A.S. 14.20.540. N.J.S.A. 19:29-1(a). Magura v. Smith, 330 A.2d 52, 54 (N.J. 1974) describes "malconduct" to consist of "failure to follow affirmative statutory requirements, and is not 'bad' or illicit conduct;" i.e., "serious deviations from standards of conduct set out by the legislature for election officials." Magura v. Smith, supra at 55. The court will utilize this significant deviation standard for those particular areas where individual acts of malconduct are found.

It is also necessary to determine whether numerous improprieties, when considered as a whole, can constitute malconduct cognizable under A.S. 15.20.540. The plaintiffs have cited In Re Contest of the Election of Vetsch v. Kerrigan, 71 N.W.2d 652 (Minn. 1955). See also Turkington v. Kachemak, supra, n.4 at 595. This case stands for the proposition that the cumulative effect of "wholesale violations of the election laws, even be they only directory" (supra at 658) would constitute malconduct under the statute:

> A decision [to disenfranchise and require another election] does not rest upon a single incident occurring during the election but upon the cumulative effect of the numerous serious violations which occurred. The purpose of the election laws is to assure

> honest elections. Such a wholesale flouting of the law cannot be tolerated when the result is to cast doubt and suspicion upon the election and impeach the integrity of the vote.

Vetsch, supra at 660.

The Minnesota court has viewed Vetsch from the perspective of the effect on the integrity of the election process and whether the result is in doubt due to the sheer weight of irregularity. Green v. Independent Consolidated School District No. 1 of Lyon County, 89 N.W.2d 12, 17 (Minn. 1958) (are there so many serious violations that there is no reasonable assurance as to the result?); Johnson v. Swenson, 119 N.W.2d 723, 728 (Minn. 1963) (is there a complete disregard of procedural rules to raise a question as to true vote of the people?); Ganske v. Independent School District No.

84, 136 N.W.2d 405, 408 (Minn. 1965) (cumulative effect of widespread enumerated irregularities.) Johnson v. Trnka, 154 N.W.2d 185 (Minn. 1967) (neglect and carelessness is not sufficient unless affects true outcome and puts results in doubt.

The cumulative effect concept of malconduct announced in Vetsch, supra, does not differ from the doctrine that widespread, great and flagrant irregularities which impeach the integrity of the process and which place the outcome in doubt are sufficient to permit a court to void an election. See discussion contained in In Re Sugar Creek Local School District, 185 N.E.2d 809 (Ohio Com. Pl. 1962), citing Vetsch, supra at 819; Application of Murphy, 243

A.2d 832, 834 (N.J. 1968). The court does not find the numerous irregularities present here to be tantamount to fraud, notwithstanding the reading of Vetsch offered by counsel for defendant Hammond. See 26 Am.Jur.2d §277. However, as the conclusions below demonstrate, the irregularities enumerated are great and in many cases flagrant in the sense of "glaring," though not proceeding from nefarious or evil intent. Therefore, this court finds that the cumulative effect of the irregularities described below to be malconduct, the impact of which was to impeach the integrity of the election process and place the true outcome in doubt.

A. Prudhoe Bay Absentee Voting by Personal Representative

The findings of fact indicate that representatives of the Alaska Teamsters Local 959 approached Teamster union members at Prudhoe Bay and procured absentee votes by personal representative when these persons were not physically disabled. These Teamster officials had been informed by election officials that this was proper.

A.S. 15.20.120(a) provides:

> Procedure on application by personal representative (a) Upon receipt of a written application by personal representative, the election official authorized to issue the ballot shall provide the ballot and other absentee voting material if the written application is signed by the applicant and is accompanied by a letter from a licensed physician or a statement signed

> by two qualified voters stating that the applicant will be unable to go to the polling place because of physical disability. [Emphasis added.]

The court cannot say that the statute was confined only to "physical disability" due to legislative oversight.

It was a significant deviation from the statute, or malconduct, for election officials to permit absentee ballots to be cast by personal representative where the voter was not physically disabled, even though he may have resided at a physically inaccessible location in Alaska. Boucher v. Bomhoff, 495 P.2d 77 (Alaska 1972). This individual act of malconduct cannot be permitted even though it arose from commendable intentions or good faith by the election officials involved. See

e.g., Magura v. Smith, 330 A.2d 52, 54 (N.J. 1974).

A voter at a physically inaccessible location may vote by absentee ballot. A.S. 15.20.010(3). However, he must apply in person (A.S. 15.20.110) or by mail (A.S. 15.20.130). The person who is physically disabled is the only qualified person who may cast a vote by personal representative, supra, notwithstanding A.S. 15.20.060 and A.S. 15.20.065. The statute is mandatory, whether the analysis be post or pre-election. O'Neal v. Simpson, 350 So.2d 998, 1006 (Miss. 1977).

The circumstances present here indicate the necessity for this approach. One of the primary purposes of the laws

regulating elections is the inviolability of the ballot. "Secrecy is the fundamental underlying primary essential of the system." Board v. Dill, 110 P. 1107, 1111 (Okla. 1910). To assure that popular government proceeds from the independence of the voter, the election statutes are designed to remove all influences intimating the potential for intimidation or reprisal. See O;Neal v. Simpson, supra at 1005. Thus, permitting physically disabled persons to vote by personal representative differs in magnitude and kind from permitting representatives from a union, with a known preference for a particular candidate, to approach union members at remote locations and obtain absentee votes by personal representative.

Therefore, these votes were illegal and should not have been counted. Since they were irretrievably commingled with other ballots without objection by the plaintiffs, the defendants argue that the plaintiffs are estopped to assert their validity. See Opinion of the Justices, 371 A.2d 616 (Me. 1977). It is not necessary to reach this question, since the court rules herein that the cumulative effect of the other numerous significant deviations from statute by election officials, in this case, has placed the actual result of this close election in doubt in any event. Additionally, it is not necessary to receive or review circumstantial evidence as to whom these particular votes were cast or in what proportion. See

Application of Murphy, 243 A.2d 832, 835-6 (N.J. 1968) (relations between the voter and others actively interested in advancing the cause of certain candidates); 26 Am.Jur.2d, Elections, §348; Anno. 155 A.L.R. 667.

Finally, it was not malconduct for the Lt. Governor to fail to establish a voting precinct or district at Prudhoe Bay. He could reasonably conclude that there were not sufficient permanent residents in that area to merit such status or that those residing there were registered elsewhere in the state.

B. Discrepancies Between Number of Ballots Cast and Number of Signatures on Register

The defendants admit that there remain a few discrepancies between the

number of ballots cast and the number of signatures on the registers. While such discrepancies are deplorable and indicative of some laxness on the part of election officials, they are not of such a magnitude (in an election where more than 108,000 ballots were cast) to warrant any conclusion of malconduct. This court finds no wrongdoing on the part of election officials.

C. Voter Registration

Obviously those voters who were not registered were not entitled to have their votes counted. AS 15.05.010(6). The defendants concede that 57 such persons had their ballots counted wrongfully. Conversely, the two properly registered voters whose votes were not counted were improperly disenfranchised.

As to James Stanley, it appears that his vote was properly rejected by election officials.

The law is clear that a voter whose name is changed by marriage may vote under her previous name or, if she desires to vote under her assumed name, must notify the Lt. Governor at least 30 days before an election so that the registration may be amended to reflect the change. A.S. 15.07.090(a). There appears to be no affirmative duty on the part of election officials to inquire as to whether such a change of name has occurred. This court finds no error on the part of election officials.

Art. V §1 of the Alaska Constitution mandates that only properly registered persons be allowed to vote.

In furtherance of this mandate, the legislature has established guidelines for registration which require the applicant to furnish information regarding the applicant's residence, term of residence, and whether the voter had been previously registered in another jurisdiction. A.S. 15.07.060. In addition, the legislature has instructed the Lt. Governor to enter into arrangements with other jurisdictions to insure that Alaska's voter registration list is accurate. A.S. 15.07.065. The legislature has instructed the Lt. Governor to promulgate regulations to further the purposes of proper voting registration. A.S. 15.07.070(a).

The deposition of the Lt. Governor and key staff members, such as

the Director of Elections, and the methods employed by elections officials, as indicated by the findings, disclose a callous disregard of these statutory requirements. There has been only a perfunctory attempt to comply with A.S. 15.07.060. A.S. 15.07.065 has not been complied with at all. This court is not convinced by the proffered excuse that compliance would be too difficult or costly. Even assuming this to be true, the Lt. Governor had an affirmative duty to seek a more workable provision for ensuring the accuracy of Alaska's voter registration list. In failing to follow the clear directive of A.S. 15.07.065, the Lt. Governor committed malconduct.

D. Improperly Marked Ballots

A.S. 15.15.360(1) clearly limits the permissible marks on ballots to only crossmarks, "X" marks, checks, or plus signs, that are clearly spaced in the square opposite the name of the candidate the voter desires to designate. A.S. 15.20.730(b)(1) indicates that a punchcard vote may be counted only if the punch is clearly spaced in the square designated by a plus sign following the name of the candidate the voter desires to select.

These statutes explicitely provide the proper and sole means by which ballots may be marked. The statute is mandatory, so the markings must be strictly scrutinized. See also, Rules for Determining Marks on Ballots, Form

01-235 (Rev. 6/78) Deposition of Lowell Thomas, Jr., exhibit 14. Since the disputed ballots are not themselves before the court, and it appears from Plaintiff's Exhibit A that there is a close issue as to the correctness of the rulings on the marks, this court finds that a material issue of fact is presented as to these ballots which cannot be resolved on summary judgment.

E. Cross-District and Cross-Precinct Voting

a. Legality of Cross-District Questioned Ballots

Assuming the voter is in all other respects qualified to vote under A.S. 15.05.010, it is permissible for state elections officials to count a vote for statewide elective office where the

voter has voted a questioned ballot in an election district other than his district of residence.

Art. V, §1 "Qualified Voters" of the Constitution of the State of Alaska reads in pertinent part:

> A voter shall have been, immediately preceding the election, a thirty day resident of the election district in which he seeks to vote, except for purposes of voting for President and Vice President of the United States other residence requirements may be prescribed by law.[1] [Emphasis added.]

[1] Prior to amendment in 1972, this portion read:

> He shall have been, immediately preceding the election, for one year a resident of Alaska and for thirty days a resident of the election district in which he seeks to vote.

The present version may have resulted from Dunn v. Blumstein, 405 U.S..330 [sic] (1972). A.S. 15.05.010 was amended in 1975 in the wake of State v. Van Dort,

502 P.2d 453 (Alaska 1972). The delegates to the Alaska Constitutional Convention do not seem to have specifically discussed this point. See Minutes to Alaska Constitutional Convention, p. 3270, et. seq.

The sensible construction of this language is that a vote will not be counted for district-wide elective office unless the voter is properly registered in that district. However, statewide elective office is a different matter.

Dunn v. Blumstein, 405 U.S. 330 (1972) and State v. Van Dort, 502 P.2d 453 (Alaska 1972), stand for the proposition that residency requirements regarding the right to vote are valid only where administratively necessary. There is no administrative reason to refuse to count votes for statewide elective offices where a voter has been permitted to cast a questioned ballot in a district other than where he is registered, assuming that registration is

valid in all other respects. Moreover, the Director of the Division of Elections, State of Alaska, was advised as to the propriety of counting these ballots in an informal opinion of the Attorney General, dated December 9, 1975. See Appendix to Defendants' Motion for Summary Judgment at p. 57.

The statutes support this view. A.S. 15.05.010(4) provides:

> A person may vote in any election who . . . (4) has been a resident of the state and of the election district in which he seeks to vote for at least 30 days just before the election . . . .

A.S. 15.07.090 Re-registration provides:

> (d) A person who claims he is a registered voter, but for whom no evidence of registration in the precinct can be found, shall be granted the right to vote in the same manner as that of a questioned

> voter and his ballot shall be treated in the same manner. The ballot shall be considered to be a "questioned ballot" and shall be so designated. The lieutenant governor or his representative shall determine whether the voter is registered in the election district before counting the ballot. A voter who has failed to obtain a transfer as provided in (c) of this section shall vote a "questioned ballot" in his precinct of residence.

A.S. 15.15.213 Questioning a Voter's Ballot provides:

> If his polling place is in question a voter shall be allowed to vote, and any election official shall consider the ballot as a questioned ballot.

A.S. 15.15.215 Disposition of Challenged and Questioned Votes provides in part:

> The merits of the challenge or question shall be determined by this official or body in accordance with the procedure prescribed for challenged

> absentee votes in A.S. 15.20.210.

A.S. 15.20.210 Procedure for District Canvass provides in pertinent part:

> (b) . . . in instances where a resident of the state has received his absentee ballot for the wrong election district and his ballot is returned to the election supervisor having jurisdiction over the election district in which he actually resides, the votes case for statewide candiates and state senate candidates, [sic] If the person has voted for candidates from the senate election district in which he resides, shall be counted. Votes for a constitutional amendment or statewide referendum shall also be counted. Votes for other local candidates shall be held invalid. [Emphasis added.]

Thus, it is apparent that there is statutory authority to permit and to count cross-district questioned ballots

for statewide elective offices. This is reasonable, since the person is qualified to vote on matters of statewide concern in all other respects. See also dicta in Martin v. Porter, 353 N.E.2d 919, 922-3 (Ohio 1976).

(b) Legality of Cross-Precinct Questioned Ballots

The discussion, supra, is generally applicable here, except the cross-precinct questioned ballot may be counted for district-wide as well as statewise elective offices. See Informal Opinion of Attorney General, supra. A.S. 15.15.213, A.S. 15.15.215, and A.S. 15.20.210 indicate these votes may be counted for statewide elective offices. Where the voter is validly registered in the district, the court

cannot conceive of a reason why the voter should be disenfranchised as to district-wide elective offices merely because he has voted in the wrong precinct of the district. Indeed, division of responsibility by precinct seems to devolve primarily from reasons of administrative convenience, but not necessity. See e.g., A.S. 15.15.090. See also dicta in Martin v. Porter, supra at 922-3.

(c) Malconduct in the Failure to Assure the Efficient Administration of Cross-Precinct and Cross-District Questioned Ballots.

Though the court concludes that these cross-district and cross-precinct questioned ballots do not violate the statutes and were properly counted, this

is not to say that the circumstances surrounding August 22, 1978, primary election remove doubt as to the outcome in this regard. Prior to the recent intense education of the court in the intricacies of the election system, the court assumed that the only permissible method of voting while absent from the district or precinct of registration was through the use of an absentee ballot.

At best, the voter has been given conflicting instructions on this matter. The "Instructions to Voters in State Elections" (available at the polling place) provides in pertinent part:

WHO MAY VOTE

> Any person may vote at any state election if he is a citizen of the United States;

> at least 18 years of age; a resident of the State and of the election district in which he seeks to vote for at least 30 days just before the election; and is registered to vote as required under Chapter 7.

WHERE AND HOW TO VOTE

> 1. You may vote in person on election day only at the polling place designated for the precinct of your residence. There is no time of residence requirement concerning precincts. If you qualify otherwise as a voter, you may vote at the polling place designated for the precinct where you legally reside on election day. [Emphasis added.]

CHALLENGES

> If your right to vote is questioned or challenged by a judge of election, you shall subscribe to an oath on the prescribed form which will be given you by the judge. You may then receive your ballot and proceed to vote.

The "Alaska Voter Handbook" (exhibit No. 9; Deposition of Lowell Thomas, Jr.) provides in pertinent part:

CHANGES IN REGISTRATION

2. ADDRESS CHANGE

If you change your mailing address after registering, contact your regional election supervisor or neighborhood local registrar and submit your change of address. This is important to ensure that your name is on the correct polling place list on election day. Change of address must be made at least 30 days before an election.

SOME QUESTIONS ABOUT REGISTRATION

4. What will happen on election day if I am not registered in the correct district and precinct?

You will be required to vote a questioned ballot. This procedure will be explained to you at the polls or you may

contact your regional election office.

WHO MAY VOTE

Only registered voters in the State of Alaska may vote.

WHERE AND HOW TO VOTE

1. Check your newspaper or contact your regional election supervisor to locate your neighborhood polling place. In rural Alaska, locations of polling places are usually available in the post office or city clerk's office.

WHO MAY VOTE BY ABSENTEE BALLOT

If you are a registered Alaska voter and will be absent from your voting precinct on election day, you may apply for an absentee ballot. [Emphasis added.]

HOW AND WHEN TO APPLY FOR AN ABSENTEE BALLOT

3. APPLICATION BY MAIL

If you will be absent from your voting precinct on the day of the election, you may apply for

an absentee ballot . . . .
[Emphasis added.]

Finally, the voter pamphlet contains a cartoon of a person scaling a mountain with a reminder from another person yelling "Be sure to request an absentee ballot before you leave town."

Against this background, the findings of fact indicate that the Division of Elections has permitted cross-district and cross-precinct questioned ballot voting on the day of the election for a period of several years. However, no regulation clarifying this policy or informing the public has been promulgated. The written instructions to election boards do not clarify this policy but instead relate primarily to the appropriate action where

the voter's name is not on the list of registered voters. Moreover, this long-term policy is communicated by oral instruction only to district and precinct election officials; they are given total discretion as to the circumstances when a voter is instructed to go to his proper precinct or district or will be permitted to vote a questioned ballot.

During the August 1978 primary election, the Lt. Governor issued a press release indicating that one could vote at any polling place if he was "out of town". It is not known how this was reported in the news media, but the affidavits indicate great inconsistency and confusion at the polls, with some persons casting questioned ballots if

they insisted, but a great many being turned away at the polls.

The concept of unlimited cross-district and cross-precinct questioned ballot voting may indeed be a noble concept, and consistent with traditional notions that everyone should get a chance to vote. However, the application of this commendable concept under the circumstances of the August 22, 1978, primary election was disastrous to the election process on that day and to the confidence in the integrity of the election system in general. It was an extremely close election. Yet, the record indicates no general notice to the public that all voters could simply go to the nearest polling place and insist on voting a questioned ballot for statewide

office. Nor where there any written procedures to assure that this policy was uniformy administered in a non-discriminatory fashion. Indeed, it is fair to conclude that hundreds of voters were turned away from the polls, and many thousands more would have voted had this policy of convenience been made a matter of general knowledge. The findings indicate utter confusion, both by voters and by election officials.

The press releases, voter handbook and instructions and election board instructions are inherently misleading and contradictory. Boucher v. Bomhoff, supra; e.g., A.S. 15.15.040, 15.15.090, 15.15.010. The policy was irregularly administered and not properly noticed; e.g., A.S. 15.15.230, Chapter 20

of Title 15; A.S. 15.07.010. Finally, in this regard, the Lt. Governor has not taken appropriate action to assure administrative efficiency of the election process. A.S. 15.15.010. See dicta Coghill v. Boucher, 511 P.2d 1297, 1301 (Alaska 1973). Even if these matters were not serious deviations from these suggested or other norms, they present the court with a myriad of irregularities appropriate and important to this court's finding of cumulative malconduct. In all, these matters have created substantial doubt as to the outcome of the August 22, 1978, primary election.

Defendants argue that plaintiffs are estopped to assert malconduct in this area. Opinion of the Justices, supra. However, plaintiff

Merdes is not estopped. Merdes v. Thomas, Superior Court No. 3AN78-5816. Also, it is not necessary to reach the question as to plaintiff Hickel because the court rules that the election process, taken as a whole is fraught with the cumulative effect of a multitude of irregularities which place the outcome in doubt and make unnecessary consideration of the merits of the estoppel argument.

F. Ballot Security

a. & b. Kwethluk and Kotlik

The ballots themselves are the best evidence of the election results. The legislature has created a scheme which results in four separate records of the election results (including telegraphic or radio certification), one

of which is the ballots. A.S. 15.15.370. Reading A.S. 15.15.430 with A.S. 15.15.440 leads to the conclusion that an election certificate is itself valid evidence of the election result. Because plaintiffs have not assailed the accuracy of the count or the certificate, this court concludes that the destruction of the ballots by local election officials does not rise to the level of malconduct requiring that the voters of Kwethluk and Kotlik be disenfranchised.

This is not, however, to condone the practice of destruction of ballots. While it is ably argaued by amicus Association of Village Council Presidents that cultural differences contribute to the lack of regularity with which the ballots were treated, this does

not wholly excuse this irregularity. It is incumbent on the Lt. Governor, through his election staff, to educate local officials in their duties. A.S. 15.15.010. This court strongly suggests that the Lt. Governor take whatever steps are necessary to ensure that local election officials are educated to properly fulfill their duties, so that the courts may indulge the presumption of regularity of the actions of election officials with greater confidence.

c. The 247 Uncounted Ballots from District 6.

Public confidence in the election process is vital in our democratic system of government. Coghill v. Boucher, 511 P.2d 1297, 1301 (Alaska

1973). Actions of election officials which tend to erode public confidence cannot be countenanced. The 247 voters whose votes were not counted and whose ballots were filed away in a supply cabinet were disenfranchised by the negligence of election officials. The public has a right to expect that they will not be so disenfranchised. Even though expert witnesses testified that they could not detect any evidence of tampering, they were equally unable to state conclusively that no tampering could have occurred. That the ballots were exposed to possible tampering is obvious in view of the facts. The burden here is on the defendants to affirmatively eliminate the possibility that the ballots had been tampered with.

MacWherter v. Turner, 52 Ill. App.2d 270, 201 N.E.2d 325, 326-27 (1964). This court finds that they have not met this burden and that the 247 ballots cannot be counted.

6 AAC 24.040 and .050 place the burden of maintaining adequate security over the ballots on the election board and vest authority in the election supervisor to see that security is maintained. There is no question in the court's mind that these officials have failed to carry this burden. The fact that they were lost and remained uncounted through the canvass and the recount, and cannot under the law be counted now, conclusively shows that these election officials have committed a significant deviation amounting to

malconduct. Boucher v. Bomhoff, 495 P.2d 77 (Alaska 1972).

d. Taylor West Affair

The Lt. Governor is charged with supervising elections. To carry out this duty, he has the power to establish procedure pursuant to the Administrative Procedure Act. A.S. 15.15.010 and A.S. 15.15.370. The incident in question points out how his failure to establish regulations for ballot security has resulted in a loss of public confidence in the integrity of the ballot. Coghill v. Boucher, supra.

While the court agrees with the defendants that the possession of election materials by Taylor West, an election official, is technically within the wording of the statutes

(A.S. 15.55.050 and A.S. 15.60.010(13)), the court cannot agree that this incident was in any way contemplated by the legislature when it devised our scheme of election laws. Neither can the court accept the rationalization offered by the election supervisor for southcentral Alaska that because Taylor West was an election official and because no harm resulted (due to his honesty) that there is no cause for concern.

This court is extremely concerned with what it perceives to be the obvious intent of the legislature in enacting our election code; to give the elective process a framework which inspires the voters with vital confidence in the integrity of their ballots. Coghill v. Boucher, supra. In no way do

the actions of Taylor West and his superiors in this situation inspire such confidence. They betray a cavalier attitude toward their duties and the spirit of the law coupled with very poor judgment. That by good fortune there was no tampering with these ballots, does not erase the fact that such loose practices create the opportunity for such tampering and destroy public confidence in the election process. While there is no reason to invalidate these ballots, lack of adequate safeguards, especially in view of the affirmative duty placed on the Lt. Governor and his staff to provide security for the election process, constitutes a significant deviation from any conceivable norm of ballot security within the clear thrust of Title 15 and

is malconduct. Boucher v. Bomhoff, 495 P.2d 77 (Alaska 1972); Coghill v. Boucher, supra.

e. Ballots in Paper Bag in Juneau

There is no significant deviation from proper security for the ballots in this incident. Again, appropriate regulations issued by the Lt. Governor would have precluded any inference of irregularity. There was no significant deviation amounting to malconduct.

f. Miscellaneous Irregularities

Such other irregularities as the plaintiffs allege, while deplorable, do not significantly affect the franchise or public confidence in the elective process. They are to be expected in any

election of this scope. This court concludes that there is no malconduct.

G. Absentee Ballots

a. Date Stamp and Postmark Requirements

It is clear that the statutory policy of Alaska's election law is a liberal one, clearly designed to extend the franchise to all qualified voters insofar as consistent with preserving the purity of the registration pool (see discussion of cross-district and cross-precinct voting, supra, and Annot. 97 ALR 2d 957). This court construes the absentee voter chapter (Title 15, ch. 20, art. 1) to be in accord rather than in derogation of this policy. To this end, no voter should be disenfranchised for errors on the part of election officials

or third parties if the voter has complied with the requirements which pertain to him. Boardman v. Esteva, 323 So. 2d 259 (Fla. 1976), cert. denied, 425 U.S. 967.

It is conceded that 35 absentee ballots were counted in contravention of these statutory requirements. It is conceded as well that 6,834 absentee ballots are clearly within the dictates of the statutes and were properly counted. The remaining 2,300 absentee ballots are in question here. The parties have stipulated that these ballots may be divided into a number of categories set forth at length in the stipulation which has been made part of this opinion.

The regional canvass board has the responsibility for determining the validity of absentee ballots before they are counted. The standards to be employed by the board are set forth in A.S. 15.20.210. Neither the failure of the ballot envelopes to be postmarked nor date stamped is listed as a mandatory ground for invalidation of the ballot. This is in contrast to the mandatory postmark requirement of prior law. See §38-0-12 ACLA 1949, as amended.

On the evidence before it, this court is unwilling to reverse the determinations made by the regional boards. This is especially true in light of the facts that plaintiffs were permitted to have watchers present throughout the examination of the

envelopes, that these watchers were free to examine the envelopes and raise objections, and that no objections were raised. Challenges to such defects are waived if not raised before the ballots are separated from their envelopes and commingled. Opinion of the Justices, 371 A.2d 616 (Me. 1977).

This conclusion does not, however, preclude the further conclusion that election officials have disregarded the statutory scheme in a way that impels this court to its ultimate conclusion of cumulative malconduct. A.S. 15.20.150 (in part) and A.S. 15.20.170 were enacted by the legislature to ensure that the canvass boards would be able to conclude that the ballots were voted in a timely manner. They are in the nature of

complementary requirements. Where both are present, there can be no doubt of the validity of the ballot. Where they are wilfully violated in a wholesale manner, the franchise of the innocent voter is placed in jeopardy and the true result of the election is placed in doubt.

Clearly, the election officials, like the voters, cannot be held accountable for the failure of the post office to postmark mail (Boardman v. Esteva, supra), but when more than one-quarter of all absentee ballots arrive without postmarks, election officials must be diligent to ensure that the other proof of timeliness, the date stamp, is correctly and timely affixed to the outer envelope. This court finds the excuses proffered for failure to perform

this duty as required by A.S. 15.20.170 unacceptable. Election officials, no matter how honest, are not free to ignore the dictates of the statutes because of lack of time or faith in their own honesty. If there is difficulty in conforming to the statute because the duties it imposes fall concurrently with other duties, application may be made to the legislature for relief, either for a change in statutory requirements or for sufficient funding to hire enough officials to comply. And as to taking the honesty of election officials on faith, this only opens a door to fraud that the legislature has deemed it advisable to shut.

This court cannot condone wilfull and substantial (affecting 1,495

ballots) violation of law by election officials. This is clearly an incident of the cumulative malconduct which pervades the primary election.[2]

b. Witness Requirements

A.S. 15.20.150 was amended by §1 ch. 16 SLA 1977 to eliminate the requirements of two witnesses or specified officials for absentee ballots cast by mail or personal representative. It is apparent that the reference to the deleted officials and persons to sign as attesting witnesses is a drafting error which should be clarified. Informal Opinion of the Attorney General

[2] This is not to condemn the handwriting of the date of reception on the envelope such as occurred in Fairbanks when the date stamp was broken. This is a commendable use of common sense.

(3/30/77). Since the intent of the legislature is clearly that a single witness is sufficient, the ballots, with a single witness signature, were properly counted.

H. Miscellaneous Irregularities

Though the charged irregularities are unfortunate, they are to be expected in an election of this magnitude. They present no pattern of irregularity nor are they of sufficient impact to support a conclusion of malconduct. Turkington v. City of Kachemak, supra.

I. Punchcard Ballots

The defendants concede that there was a violation of A.S. 15.20.690 when the computer broke down in Juneau.

There is, however, no evidence that any inaccuracy resulted and the transfer which took place from computer to computer was no more than a technical violation for which this court does not find it necessary or desirable to disenfranchise such a large segment of the voting population. Turkington v. City of Kachemak, supra. In the future, officials should take care to follow even the technical requirements of the applicable statutes.

As to the early count, this court concludes that such a procedure is permissible under A.S. 15.20.640 and the regulations (6AAC 23.010-.070) promulgated pursuant to A.S. 15.15.010 and A.S. 15.15.330. While the affidavits betray some problems with security and

procedure, the effort to deal with such procedures through properly promulgated regulations is commendable. Coghill v. Boucher, 511 P.2d 1297, 1301 (Alaska 1973).

CONCLUSION

All parties to this action during argument conceded that no election can be held with no mistakes and that in the course of performing any function certain errors and omissions occur. With this, the court agrees.

The court's findings of fact and conclusions of law herein are not based upon any determination by the court that any of the persons involved did, or failed to do or perform, any act or duty out of an intentional desire to subvert the election process. Neither is there

any evidence of fraud or corruption on the part of any state official. However, the court's findings do reflect the acts of malconduct, mistakes and use of confusing procedures of election officials in violation of state statutes and regulations.

The record tends to indicate that previous elections, in many respects, suffered from similar deficiencies and malconduct as herein enumerated. However, this can be no consolation, since that does not justify the continuation of such practices in conducting this election regardless of the good motives of dedicated election officials, past or present.

This action calls upon this court to answer important questions

pertaining to the political rights of the citizens of Alaska. This court must determine whether the expression of the will of the electorate was frustrated as a result of widespread non-compliance with the election laws of the state.

The ultimate matter to be decided in these motions for summary judgment now before the court is whether the undisputed facts, when tested under the election laws of Alaska, constitute malconduct on the part of election officials sufficient to change the result of the primary election held on August 22, 1978. This court has found that certain conduct must be considered to be individual acts of malconduct. As well, the cumulative effect of these, with many other acts, when considered as a whole,

is deemed malconduct. These areas and acts have been noted in the text.

The next question to be determined is if such malconduct was sufficient to change the result of the election. This court has previously enumerated the effect of those actions on the elective process. There was a frustration or disallowance of certain numbers of ballots for a variety of reasons. In other cases, the findings, by their very nature, indicate the impossibility of a mathematical determination of voters disenfranchised because of state officials' malconduct. As well, these findings reflect the failure of the election officials to follow statutory mandates and to fairly and equitably allow all voters to make

their choice as to whether to vote or not to vote, under the same rules and circumstances free of unregulated election official decision as to when and where they could vote in the areas discussed in the foregoing opinion.

This court finds such cumulative malconduct casts such doubt and suspicion as to raise a doubt as to the true vote of the people and, therefore, was sufficient to change the result of the primary election of August 22, 1978, as to both plaintiff-candidates and both defendant-candidates.

Therefore,

IT IS ORDERED that the certifications of election issued by the Lt. Governor to Candidates Hammond and Croft are set aside and a new election

ordered at the earliest practicable date in compliance with Alaska laws, administered in a manner not inconsistent with this decision. If possible, the primary election should be held prior to the general election.

All voters eligible to vote on the date of the new election shall be entitled to vote.

The candidates shall be limited to Hickel and Hammond in the Republican primary, and Merdes and Croft in the Democratic primary. James F. Doherty v. Edward J. Mahoney, et al. and George K. Arthur, et al., 399 N.Y.S.2d 641.

The general election, in any event, shall be held as presently scheduled with the names of all gubernaturial and Lt. Governor candidates

not on teh ballot if it is determined not practicable to complete the new primary and place the gubernatorial candidates on the general election ballot.

The Lt. Governor is directed to certify to the court the suggested date for the general election for Governor and Lt. Governor following the new primary election.

The Lt. Governor shall, as soon as practicable, certify to the court the suggested date for the new primary so that appropriate orders may be entered.

The foregoing certification of the Lt. Governor concerning the primary dates and general election dates, shall, in any event, be accomplished within 10 days from the date of this order.

Pursuant to Civil Rule 54(b), the court finds that there is no just reason for delay of entry of the partial summary judgment herein, and

IT IS ORDERED ENTERED.

DATED at Anchorage, Alaska, this 13th day of October, 1978.

Ralph E. Moody, Presiding
Superior Court Judge

APPENDIX B

THE SUPREME COURT OF THE STATE OF ALASKA

JAY HAMMOND,

Appellant in No. 4281;

CHANCY CROFT,

Appellant in No. 4282;

LOWELL THOMAS, JR., Lieutenant Governor of Alaska; PATTY ANN POLLEY, Director, Division of Elections; MARY JO HOBBS, Supervisor of Elections, Juneau; JO ANN CRANE, Supervisor of Elections, Nome; OCTAVIA HANSEN, Supervisor of Elections, Anchorage; and ANN SPIELBERG, Supervisor of Elections, Fairbanks,

Appellants in No. 4283;

JALMAR KERTTULA,

Appellant in No. 4291;

v.

WALTER J. HICKEL and EDWARD A. MERDES,

Appellees.

WALTER J. HICKEL,

Cross-Appellant in No. 4284;

EDWARD A. MERDES,

Cross-Appellant in No. 4285;

v.

LOWELL THOMAS, JR., Lieutenant Governor of Alaska; PATTY ANN POLLEY, Director, Division of Elections; MARY JO HOBBS, Supervisor of Elections, Juneau; JO ANN CRANE, Supervisor Elections, Nome; OCTAVIA HANSEN, Supervisor of Elections, Anchorage; ANN SPIELBERG, Supervisor of Elections, Fairbanks; JAY HAMMOND; CHANCY CROFT; and JALMAR KERTTULA,

Cross-Appellees.

MEMORANDUM AND ORDER

Before: Rabinowitz, Chief Justice, Connor, Boochever and Burke, Justices, and Dimond, Senior Justice. [Matthews, Justice, not participating.]

INTRODUCTION

This case comes to this court on appeal from the decision of the superior court on cross-motions for summary judgment in an election contest brought pursuant to the provisions of AS 15.20.540. The superior court granted summary judgment to appellees and found that there was malconduct on the part of election officials which was sufficient to impeach the integrity of the election process and place the true outcome in doubt. Appellants have appealed from the summary judgment and appellees have cross-appealed as to those issues decided adversely to them by the trial court. For reasons set forth below we find it necessary to reverse the order of the trial court.[1]

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1. While we find it necessary to reverse Judge Moody, we commend him on his able analysis and comprehensive treatment on the numerous complex issues. We also express our appreciation to the law clerks who worked around the clock with him in order to expedite the urgent decision.

As 15.20.540 specifies those persons who may contest an election and the grounds for such a contest. It provides:

> Grounds for election contest. A defeated candidate or 10 qualified voters may contest the nomination or election of any person or the approval or rejection of any question or proposition upon one or more of the following grounds: (1) malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election; (2) when the person certified as elected or nominated is not qualified as required by law; (3) any corrupt practice as defined by law sufficient to change the results of the election.

In bringing this election contest, appellees alleged malconduct, fraud, or corruption on the part of election officials sufficient to change the result of the election. The trial court found no evid-

ence of either fraud or corruption, and this finding is not challenged by appellees and cross-appellants. We find no reason to reverse this finding. The lower court did find, however, that there was "malconduct" sufficient to impeach the integrity of the election process and place the true outcome in doubt. This ultimate legal conclusion is necessarily predicated on two lesser, but critical conclusions of law: (1) a finding of malconduct on behalf of election officials and (2) a finding that such malconduct was sufficient to change the result of the election.[2]

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2. The lower court eventually concluded that there was "cumulative malconduct" sufficient to change the result of the election. However, this conclusion regarding "sufficient to

change the result" rests upon a finding of "doubt" as to the true vote of the people.

1. THE CONCEPT OF "MALCONDUCT"

Boucher v. Bomhoff, 495 P.2d 77 (Alaska 1972), held that "malconduct" as used in AS 15.20.540, means a significant deviation from statutorily or constitutionally prescribed norms. Boucher involved a ballot proposal whose wording introduced a "Significant bias" into the vote, in addition to being a significant deviation from constitutionally and statutorily prescribed norms. Id. at 80-81. If a bias has been introduced into the vote, we read Boucher as holding that "malconduct" exists if the bias can be shown to be the result of a significant deviation from lawfuly prescribed norms.

In the case before the court,

we find no evidence of any irregularity causing bias in the vote. All irregularities were random in their effect, if any, on the casting of votes. Irregularities containing no element of bias, even if they amount to significant deviations from prescribed norms, do not necessarily constitute malconduct. Significant deviations which impact randomly on voter behaviour will amount to malconduct if the significant deviations from prescribed norms by election officials are imbued with scienter, a knowing noncompliance with the law or a reckless indifference to norms established by law.[3] Thus,

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3. In common usage, malconduct is defined as: "Ill conduct, especially dishonest conduct, maladministration, or

as applied to officers, official misconduct." Black's Law Dictionary 1108 (rev. 4th ed. 1968). See also McGallagherv. Bosarge, 136 So.2d 181 (Ala. 1961); Taliaferro v. Lee, 13 So.2d 125 (Ala. 1893).

evidence of an election official's good faith may preclude a finding of malconduct under certain circumstances.[4]

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4. See Turkington v. City of Kachemak, 380 P.2d 593, 595 (Alaska 1963).

In concluding that there was malconduct on the part of election officials, the superior court, in several instances, cumulated individual irregularities which, when analyzed separately, did not amount to malconduct because such irregularities did not constitute "signifiant deviations" from prescribed norms. Under the facts presented, it was error for the trial court to cumulate isolated instances of irregularity to support a finding of malconduct. We believe that each alleged deviation from a statutorily or constitutionally prescribed norm must be analyzed individually to determine if it is "significant" and to ascertain if it involves an element of scienter. Once it

is determined that the individual instance of noncompliance amounts to malconduct, a determination must be made of the number of votes affected. The total number of votes affected by all such incidents must then be considered in ascertaining whether they are sufficient to change the result of the election.

It may be that, in rare circumstances, an election will be so permeated with numerous serious violations of law, not individually amounting to malconduct, that substantial doubt will be cast on the outcome of the vote. Under such circumstances, cumulation or irregularities may be proper and will support a finding of malconduct. See, e.g., In re Contest of Election of Vetsch, 71 N.W.2d 652 (Minn. 1955). In the case at bar,

however, while we find instances of malconduct, the isolated instances of irregularity do not so permeate the election with numerous serious violations of law as to cast substantial doubt on the outcome of the vote.

Alaska elections are primarily conducted by many volunteer workers. Unique problems are presented in the vast area encompassed as well as the varied cultural backgrounds and primary languages of voters. Under these circumstances minor irregularities and other good faith errors and omissions may be anticipated, although we do not condone any such departures from lawful requirements. From the evidence presented, the errors that occurred in this election appear to be of tha nature. There were

no such numerous serious violations as to permeate the entire election process, so as to require the extreme remedy of a new election. Accordingly, the superior court's conclusion, based on cumulation of irregularities, that a new primary election is required, is reversed.

2. THE CONCEPT OF "SUFFICIENT TO CHANGE THE RESULT"

Any malconduct on the part of the election officials must be of sufficient magnitude "to change the result of the election." AS 15.20.540.[5]

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5. We have interpreted this to mean that a party challenging an election must prove "that the alleged malconduct could have changed the result of the election." Boucher v. Bomhoff, 495 P.2d 77, 80 n.5 (Alaska 1972). The contestant need not show that the malconduct in fact changed the result of the election.

In the present case, the trial court found cumulative malconduct sufficient to change the result of the primary election, but made no finding as to how the votes allegedly affected by malconduct could have changed the result of the election. Fulfillment of the statutory requirement rested on the court's belief that the malconduct impeached the integrity of the election process and placed the true outcome in doubt. This was error.

We believe that more concrete standards must be applied in order to determine if votes affected by malconduct are sufficient in number to change the result of the election. The method used to determine if the malconduct could have

changed the result of the election will depend upon whether the malconduct injected a bias into the vote. If the bias has tended to favor one candidate over another and the number of votes affected by the malconduct can be ascertained with precision, all such votes will be awarded to the disfavored candidate to determine if the result of the election would be changed. If the number of votes affected by the bias cannot be ascertained with precision, a new election may be ordered, depending upon the nature of the bias and the margin of votes separating the candidates. See Boucher v. Bomhoff, 495 P.2d 77 (Alaska 1972). Where the malconduct has not injected any bias into the vote, but instead affects individual votes in a

random fashion, those votes should be either counted or disregarded, if the can be identified, and the results tabulated accordingly. Finally, if the malconduct has a random impact on votes and those votes cannot be precisely identified, we hold that the contaminated votes must be deducted from the vote totals of each candidate in the precinct or district where the contaminated votes were cast. See, e.g, Grounds v. Lawe, 193 P.2d 447, 453 (Ariz. 1948); Singletary v. Kelley, 51 Cal. Rptr. 682 (Cal. App. 1966); Russell v. McDowell, 23 P. 183, 184 (Cal. 1890); Thornton v. Gardner, 195 N.E.2d 723, 724 (Ill. 1964). Similarly if a specified number of votes should have been counted but are no longer available for counting, they should be added to the

vote totals of each candidate in proportion to the votes received by the candidate in the precinct or district in which the votes would otherwise be counted.[6] The invalid votes will

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6. If the proportion of votes to be counted to the proportion voted in the precinct or district is so great as to render this method unsuitable based on a stitistical approach they should be counted according to the ration of votes received in the statewide election. The remedy of a re-election may be required under certain circumstances. See Finkelstein & Robbins, Mathematical Probability in Election Challenges, 73 Colum.L.Rev. 241 (1973).

be deducted in this pro rata fashion to determine if the malconduct could have affected the result of the election. This is the procedure which should have been followed here with respect to those votes randomly affected by those actions of election officials which amount to malconduct.

3. THE TAYLOR WEST INCIDENT

The superior court erred in concluding that malconduct committed by virtue of Taylor West's handling of approximately 2,000 questioned ballots should be considered, in determining whether there was cumulative malconduct sufficient to change the result of the primary election.

Taylor West, age seventeen, was

employed by the Division of Elections as a full-time election clerk from June 12 to August 29, 1978. On the evening of August 22, 1978, he was working in the computer counting center at 5700 Tudor Road, in Anchorage. At approximately 10:00 p.m., in the performance of his official duties , West took possession of some 2,000 quested ballots which were to be transported from the computer center to the Anchorage elections office. West placed the ballots, contained in two large bags, in his car. He then drove to his place of residence where he parked and locked the vehicle, leaving the ballots in it overnight. At approximately 7:00 a.m. the next morning West returned to the car. He found it still locked and the contents appeared to be

undisturbed. He then drove to the elections office where he again parked and locked the car. The ballots were left in the car until later in the morning, when they were unloaded and taken in the elections office by West.

The superior court found that West and his supervisors were guilty of malconduct in the handling of these ballots, in that they faied to provide adequate security against possible tampering, thereby destrying public confidence in the election process. The court concluded that such action "constitutes a significant deviation from any conceivable norm of ballot security within the clear thrust of [the election code] and is malconduct."

We agree with the conclusion

that West's handling of the questioned ballots was malconduct, and hold accordingly. However, we disagree with the superior court's further conclusion that such malconduct should be considered in determining whether there was cumulative malconduct sufficient to change the result of the primary election.

The superior court found: (1) that there was no evidence that the ballots had been disturbed or tampered with during the time they were in West's custody, (2) that West's possession of the ballots was "technically" lawful under AS 15.55.050 and AS 15.60.010(13), and (3) that there was no reason to invalidate them. We agree. Such being the case, we fail to understand how the malconduct connected with this particular

incident could contribute in any way to change the result of the election.

4. HANDLING OF BALLOTS AND BALLOT SECURITY

(a) Ballots from Kotlick and Kwethluk

In Kweethluk and Kotlik a total of 141 ballots (104 from Kwethluk and 37 from Kotlik) were discarded rather than mailed to the lieutenant governor, as required by AS 15.15.370. This amounts to a significant deviation from the positve statutory duty placed upon the election board to mail the ballots to the lieutenant governor. This deviation does not in itself, however, require that these votes be disallowed.

We hold that AS 15.15.430, read in conjunction with AS 15.15.440, permits

the election certificate to be considered as evidence of the election result, in the absence of evidence of fraud, corruption, or scienter on the part of any member of the election board in tallying the votes and executing the certificate.

Appellees assert that the Kotlik and Kwethluk ballots, which were later recovered, cannot be utilized because they were mutilated and because there was an opportunity to tamper with those ballots. However, given the particular facts surrounding the recovery of the ballots, the ballots could be of some value in demonstrating that the certificate of the election board was entitled to be included in the canvass by the lieutenant governor.

The affidavit of Ms. Jo Anne

Crane, election supervisor for Northwest Alaska for the August 22, 1978, primary election, states that Ms. Crane was informed by her staff that the only major mistake made by those election precincts was the failure of the respective election chairmen to send the used ballots to Juneau. The election results in each district were tallied in a tally book, reported to the election office in Nome by telephone, and ultimately by certificate on the cover of the tally book. Christopher Aketachunak, election chairman in Kotlik, sent unused ballots, ballot stubs, one tally book and two questioned ballots to Juneau. He stated that he "destroyed" the ballots thinking that he did not need to send them in to Juneau as he had certified the official

count on the tally book. Similarly, the used ballots were "destroyed" in Kwethluk.

In recount proceedings the envelopes containing the unused ballots were presented. Thirty-seven ballots were cast in Kotlik, and unused ballots numbered from 38 upwards were presented upon recount.

In investigative proceedings subsequent to the recount, a state ombudsman investigator discovered 35 out of the 37 ballots from Kotlik, and 104 of the Kwethluk ballots, all 104 ballot bottoms, and 78 of the tops, were discovered. The return of the unused ballots to Juneau, coupled with the discovery of a significant portion of the used ballots from both locations, justifies a finding

that election fraud was unlikely, and the vote tallies were entitled to be counted by the lieutenant governor in the original tally and the recount. The returning of the unused ballots, and the recovery of part of the used ballots tend to corroborate the validity of the local election boards' certificates.

(b) The 247 questioned ballots from District 6

The superior court found that 247 questioned ballots from District 6 in Anchorage were misplaced by election officials and were discovered in unlocked cabinet in the election office in Anchorage on September 23, 1978, as well after the certification of the primary election nominees.

Each of these ballots is

contained within two sealed envelopes. An expert witness called by the state testified that there was a high degree of probability that no tampering with the envelopes had occurred. Appellees' expert witness could find no evidence that the envelopes had been tampered with. Neither expert could say conclusively, i.e., with absolute certitude, that the envelopes had not been tampered with. We note the circumstance that if someone had tampered with the ballots it would be unlikely that he would put them in a place where they would not be discovered until after the election contest had commenced.

In these circumstances we hold that the state met its burden of proof, by a preponderance of the evidence, that

the ballots were not the instrument of fraud and that it was probable that they had not been tampered with. See In re Democratic Primary Election fo Somerset Township, 174 A.2d 23 (Pa. 1961); Appeal of McCaffrey, 11 A.2d 893 (Pa. 1940); Robinson v. Osborne, 314 S.W.2d 681 (Ky. 1958); Tebbe v. Smith, 41 P. 454 (Cal. 1895).[7] While we affirm the

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7. Appellees cite MacWherter v. Turner, 201 N.E.2d 325 (Ill. App. 1964); Armbrust v. Starkey, 119 N.E. 2d 910 (Ill. 1954); Nickerson v. Aimo, 266 A.2d 828 (N.H. 1970); Thoms v. Andersen, 235 N.W.2d 898 (S.D. 1975); Ryan v. Montgomery, 240 N.W.2d 236 (Mich. 1976); Coombs v. Barger, 116 P.2d 390 (Utah 1941); Wilson v. Burridge, 346 P.2d 282 (Wyo. 1959); and Kincer v. Holbrook, 307 S.W.2d 922 (Ky. 1967). They assert that these cases require that in circumstances such as this it must be shown that there was no reasonable opportunity for tampering with the ballots. We find some of these cases distinguishable in various respects and others simply not

persuasive. Moreover, some of these cases actually support the position of the state.

the factual findings of the superior court, we reverse its holding as to the legal standard to be applied to those findings. Under the applicable law the ballots are entitled to be counted and added to the totals of the various candidates.

It follows that these ballots should be counted and added to the totals of the various candidates. The state asserts that election officials have determined that ten of these ballots were cast by persons not properly registered. Those ballots should be eliminated from the count if that is the case.

5. THE BAG OF BALLOTS FOUND IN JUNEAU ON SEPTEMBER 29, 1978

On September 29, 1978, Mr.

James Thompson noticed a bag of ballots in Juneau while examining election materials on behalf of candidate Hickel. Upon seeing the bag and checking its contents, Mr. Thompson became suspicious of commingling and counting of improper ballots. The materials found by Mr. Thompson were the envelopes and other materials segretated as a result of the September 18, 1978, recount in which rejected questioned ballots were reviewed. The superior court found "no significant deviation from proper security" for these ballots. We agree and affirm the court's finding of no malconduct.

6. THE 15 BALLOTS FOUND IN JUNEAU

This item is not covered by the superior court's memorandum decision, but

it is covered in the report of the special master and has been raised in this appeal. It appears that 12 of these ballots, inadvertently left among empty outer envelopes sent to Juneau from the Anchorage election office, have been kept under adequate security. They should now be counted and added to the totals of the various candidates. As to the remaining three ballots, our views are as follows.

The ballot from District 3 should not be counted, for the reasons stated in the Master's Report.

The ballot from District 20 may be counted if the qualifications of the voter, and the validity of the ballot, are established through the regular procedures of the election officials.

The ballot from District 17

should not be counted, for the reasons stated in the Master's Report.

7. ADMITTED IRREGULARITIES

The noncandidate appellants conceded for the purpose of the summary judgment motion that 57 unregistered voters were permitted to cast ballots in the election, 38 additional ballots were improperly counted and two registered voters were wrongfully denied the franchise. In our view, the admitted mishandling of these 97 ballots constituted malconduct on the part of election officials, and the ballots should not have been included in the vote totals of the various candidates. Each candidate's final vote count must therefore be reduced on a pro rata basis to reflect the presumably random distribu-

tion of ballots invalidly cast,[8]

8. The result of the pro rata reduction in vote totals for each candidate is indicated in the Appendix.

for the purpose of determining whether the irregularly cast votes were sufficient to change the result of the election.

8. DISCREPANCIES BETWEEN NUMBER OF BALLOTS CAST AND NUMBER OF SIGNATURES ON THE REGISTER

Appellees alleged in their motion for summary judgment before the superior court that several hundred ballots given to voters who signed the original registers were lost or unaccounted for.[9] This allegation

9. AS 15.15.180 provides for the keeping of an original register at the polling place:

> The judges shall keep an original register in which each voter before receiving his ballot shall sign his name and give both his resident and mailing address. A record shall be

kept in the registration book in space provided of the name of persons who offer to vote but actually do not vote, and a brief statement of explanation. the signing of the register constitutes a declaration by the voter that he is qualified to vote.

was based on a comparison of the total number of ballots cast in certain districts and the number of voter signatures appearing on the original registers. The state's subsequent audit of the registers showed that most of these discrepancies were explainable as errors in the original register which were traceable through the duplicate register and the questioned voter register.[10] The noncandidate

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10. The superior court's findings of fact established that election officials were instructed regarding the use of three registers: the main original register, the duplicate register and the questioned voter register. The normal procedure on election day was as follows:

> [A] voter would sign his or her name to the main original register

upon entering the polling place. The election official would then check the name against the duplicate register, which consisted of a computer printout listing the names of all registered voters in the precinct. If the voter's name appeared on the duplicate register, he was given a regular ballot and allowed to vote.

If the voter's name was not on the duplicate register, election officials were instructed to place the person's name on the questioned voter register which, depending on the precinct, consisted either of a separate register book or a section at the back of the main original register. In addition, there was a space on the back of the envelope containing the duplicate register which could be used to list questioned votes.

In some precincts, a slightly different procedure was followed under which voters were asked their names and checked against the duplicate register before they signed the main original register. If the voter's name was not on the duplicate register he or she was asked to sign the questioned voter register only.

appellants conceded that approximately 80 of the apparent discrepancies remain unsolved.[11] However, the superior

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11. The audit first concluded that 89 total ballots could not be accounted for through signatures on the different registers. This number was later revised down to 80 as nine of the discrepancies were resolved.

court found that the number of ballots involved were "not of such a magnitude . . . to warrant any conclusion of malconduct." This holding is affirmed.[12]

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12. It should be emphasized here that the 80 unexplained discrepancies are distinct from the 97 conceded irregularities discussed in a separate section of this memorandum and order.

9. CROSS-PRECINCT VOTING

We affirm the superior court's holding that cross-precinct voting is authorized by statute. Cross-precinct voting occurs when a voter, registered in one precinct, votes a questioned ballot in a different precinct in the same election district. There is no constitutional requirement of precinct residency, and there is clear statutory authorization for persons claiming to be registered voters to vote a questioned ballot if there is no evidence of registration in the precinct in which the voter seeks to vote. The lieutenant governor or his representatiave is required to determine whether the voter is registered in the election district before counting the

ballot. See Alaska Const. art. 5, § 1, AS 15.07.090, 15.15.213, 15.15.215 and 15.20.210.

10. CROSS-DISTRICT VCTING

A much more difficult problem is involved in considering the legality of cross-district voting. Cross-district voting occurs when a voter, registered in one district, casts a questioned ballot in a different district. Questions are presented with reference to the constitutionality of such voting under Article V, Section 1 of the Constitution of the State of Alaska, which states that a voter shall have been a thirty-day resident of the election district in which he seeks to vote. Moreover, the statutory authority referred to in paragraph 9, supra, is confusing as it

pertains to cross-district voting because of the requirements that the lieutenant governor or his representative determine whether a voter is registered in the district before counting the ballot. AS 15.07.090(d). Since challenges of questioned ballots are to be determined in the same manner as challenged absentee ballots, AS 15.20.210(b) may possibly be construed as authorizing the counting of cross-district votes for statewide candidates.

The superior court found that since 1968 it has been the general policy of state election officials to allow persons outside their home districts to cast a questioned vote, and then count the ballots if the persons are properly registered. Allowing cross-district

voting has been the practice of the Division of Elections, at least since the 1972 general election.

One voting in a district other than that in which the voter is registered must cast a questioned ballot. The voter places the ballot in a small blank envelope which is sealed and then put in a larger envelope on which the information concerning that voter's residence is located. The larger envelope is then sealed. AS 15.15.215.

Provision is made for the challenge by the election supervisor or the district absentee canvassing board of the name of an absentee voter when read from the voter's certificate on the back of the larger envelope if there is good reason to suspect that the challenged

voter is not qualified to vote. AS 15.20.210. Challenged votes are segretated and the inner envelope is not removed, mingled with other votes, nor counted. Without a timely challenge, the votes are irretrievably mingled.

Representatives of candidates may be present at the district canvass. The superior court found that during the canvass representatives for candidates Hickel and Merdes were present during the counting of cross-district questioned ballots. In fact, Mr. Mead Treadwell of the Hickel for Governor Committee, in a letter dated September 7, 1978, the day before the completion of the convass, requested that certain cross-district ballots be counted. Certainly the candidates had every opportunity to make

known to the canvassing board any objections to a long established procedure such as cross-district voting.

We affirm the trial judge's holding that challenges to the validity of cross-district voting are waived if not raised before the ballots are separated and commingled. To hold otherwise would permit parties to withhold challenges to await the outcome of an election and then, after it is too late to prevent the mingling of ballots, contest their validity. Opinion of the Justices, 731 A.2d 616 (Me. 1977); Bell v. Gannaway, 277 N.W.2d 797, 804-05 (Minn. 1975).[13]

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13. Chief Justice Rabinowitz and Senior Justice Dimond would hold that cross-district voting is no violation of

the Constitution of the State of Alaska and is authorized by statute.

11. ADMINISTRATION OF CROSS-DISTRICT AND CROSS-PRECINCT VOTING

The superior court found that the administration of cross-precinct and cross-district voting by election officials at the local level constituted malconduct because of nonuniform and distriminatory application of voting procedures to individual voters. In addition, the tiral court found that the state supplied inconsistent and conflicting information to voters and to election officials regarding policy on cross-district voting.

We believe that, based upon the law and the facts, a finding of malconduct on behalf of election officials was error. We do not think that the facts

reveal a nonuniform or discriminatory application of voting procedures to individual voters. The affidavits presented by appellees[14] tend to prove

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14. We rely only on those affidavits which are in proper order. These include the affidavits submitted by Roger L. Hartig, Dorothy F. Fetrow, Pauline May Farr, Phyllis D. Fishcer, Donna Agasti, Gertrude E. Wells, Hazel Gallagher, Virginia Ryder, and Oscar Geravitis.

that the state's policy with respect to cross-precinct/cross-district voting was applied in an even handed fashion.[15]

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15. The evidence indicated that the procedures followed by election officials with respect to cross-precinct and crossdistrict voters were as follows:

1) Those voters whose names were not discovered on the precinct registration list were advised to go to their own election precinct to vote.

2) In some cases, this precinct was located in another voting district.

3) Some of those voters whose names were not discovered on the registration lists insisted on voting questioned ballots and were permitted to do so.

4) Other voters did not insist and either journeyed to their proper precinct and cast their vote or chose not to vote.

5) Still other voters were not told

to go to their proper precinct if it appeared that they might be disenfranchised because of time constraints (e.g., not being able to reach their proper precinct before the polls would close). They voted questioned ballots.

The affidavits of Patricia Ann Polley, Director, Divison of Elections, and Betty Irvine, an elections official, reveal that the facts asserted by appellees' affiants were in accordance with the state's instructions to election officials.[16] There is no evidence

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16. The area election supervisors and local election supervisors received the following instructions:

(a) A voter is to be instructed to vote in the precinct in which he resides and is registered.

(b) When a voter moves to a new precinct he should transfer his registration to the new precinct at least 30 days prior to an election.

(c) If a voter fails to transfer his registration, he should either vote a regular absentee ballot in the precinct in which he is registered or vote a questioned ballot in the precinct in which he resides.

(d) If a person knows he will be absent from his precinct on election day, he should request an absentee ballot by mail or vote in an in-person absentee ballot before a local absentee ballot election official.

(e) If a person finds himself out of town on election day, he should vote a questioned ballot at the place he finds himself.

(f) If a person is in his town of residense, (sec) but through exigent circumstance or limited time cannot reach the polling place of his precinct of residence, he should vote a questioned ballot in any other precinct.

(g) Any voter insisting on voting a questioned ballot in any precinct for any reason should be allowed to do so.

to support the trial court's finding that hundreds of voters were denied their rights to vote by being turned away from the polls or that thousands of voters would have exercised their franchise had the state's policy been made a matter of general knowledge.[17] Accordingly,

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17. The state's policy with respect to cross-precinct and cross-district voting was not contained in the "Alaska Voter Handbook" or in the "Instruction to Voters in State Elections." Public announcements were made, however, over radio and through the press of the opportunity so to vote.

we find no evidence of nonuniform enforcement sufficient to constitute malconduct.

The superior court also concluded that the state supplied inconsistent and conflicting information to voters regarding policy on cross-precinct/cross/district voting. While we believe that there was some conflict in the state's messages, we hold that such inconsistencies neither amounted to a significant deviation from statutorily prescribed norms nor were they the product of conduct involving scientor. The lieutenant governor and election officials were acting in good faith in an attempt to enfranchise as many qualified voters as possible in accordance with

what they perceived to be a valid and long-standing state policy. The superior court's finding of malconduct must therefore be reversed.

12. VOTER REGISTRATION

Concerning voter registration, the superior court held that "[i]n failing to follow the clear direction of AS 15.07.065, the lieutenant governor committed malconduct."[18] This

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18. The superior court further found that the lieutenant governor and key staff members had callously disregarded statutory requirements pertaining to voter registration. More specifically, the court found:

> AS 15.07.065 has not been complied with at all. This court is not convinced by the proffered excuse that compliance would be too difficult or costly. Even assuming this to be true, the Lt. Governor had an affirmative duty to seek a more workable provision for ensuring

the accuracy of Alaska's voter regitration list.

statute provides:

> The lieutenant governor shall enter into reciprocal agreements or other arrangements for the exchange of voter registration information with the election officers in other jurisdictions to ensure that the states' voter registration is accurate and up to date and to preclude a person from voting in Alaska and in other jurisdiction at the same election, thus preventing election fraud.

Counsel for the lieutenant governor conceded that no formal agreements have been entered into by the lieutenant governor pursuant to this statute but nevertheless contends that the lack of formal reciprocal agreements does not constitute malconduct in the circumstances of this case. Our review of the record and the statutes implicated convinces us that the superior court

erred in holding that the lieutenant governor failed to comply with AS 15.07.065 and taht such noncomplaince consituted malconduct on his part.

Although it might have been preferable for the lieutenant governor to have made efforts to enter into formal reciprocal agreements with other states where feasible,[19] the record discloses

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19. It appears that very few states have a central election office.

that the lieutenant governor's staff routinely sends notices of cancellation of previous voter registration to other jurisdictions when informed by applicants that they are registered voters of other jurisdictions. It also appears that at times the registrant is given the cancellation notice card and requested to forward it to the former voting jurisdictions. The record further demonstrates that Alaska regularly receives information similar in character in return. Given the foregoing, we conclude that no basis exists for a holding that the lieutenant governor did not comply with the provisions of AS 15.07.065.[20]

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20. We note that the second

stated purpose of AS 15.07.065 is not applicable to the situation of Alaska's primary. This latter purpose of the statute is intended to prevent persons from voting more than once in elections for national offices.

Additionally, the superior court observed that there had been only a perfunctory attempt on the lieutenant

governor's part to comply with AS 15.07.060.[21] We have concluded

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21. AS 15.07.060(a) provides:

> Each applicant who requests registration or re-registration shall supply the following information:
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> (1) name and sex;
> (2) address and other necessary information establishing residence if requested;
> (3) election district and precinct as of the date of registration;
> (4) term of residence in state and in election district; and whether the applicant has previously been registered to vote in another jurisdiction, if so, where;
> (5) a declaration that the registrant will be 18 years of age or older on or before the date of the next statewide election;
> (6) a declaration that the registrant is a citizen of the United States;
> (7) date of application;
> (8) signature or mark.
>
> (b) If the applicant has been previously registered to vote in

another jurisdiction, he shall surrender to the registration official any voter registration or identification card or credentials from that jursidction the applicant may possess. The lieutenant governor shall notify the chief elections officer in that jurisdiction that the applicant has registered to vote in Alaska, request that jurisdiction to cancel the applicant's voter registration there, and return the applicant's voter registration or identification card or credentials, if any, to that jurisdiction.

that it is unnecessary to determine whether or not there is adequate factual basis for the superior court's characterization. The superior court did conclude that "There is no evidence showing that any individual did, in fact, vote in Alaska and elsewhere at the same time." Pursuant to voter registration forms furnished by the lieutenant governor, the registrant is required to supply the information called for by the form itself. The only information not supplied in the form is whther the voter has previously been registered to vote in another jurisdiction. As to this information, the record indicates that registration officials routinely request this data verbally when a person seeks to

register.

13. PRUDHOE BAY "PERSONAL REPRESENTATIVE" ABSENTEE BALLOTS

The superior court found that 532 voters working in the Prudhoe Bay area were issued absentee ballots obtained for them and delivered to them by business agents for Teamsters Local 959, who were acting as their "personal representatives." Each of these voters obtained their absentee ballot by filling out an application form which authorized a personal representative to obtain an absentee ballot for them. The election supervisor in Fairbanks ascertained that each of these voters was properly registered to vote in Alaska and issued the ballots pursuant to an interpretation of the various sections of Alaska's

election code providing for absentee ballots.[22] Appellees agree that

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22. These provisions are AS 15.20.010 to 15.20.220 of Alaska's election laws. As appellees Hickel and Merdes made clear in their in their memorandum in support of their motion for summary judgment in the superior court, "[n]o contention is being raised that the persons who voted were not registered voters."

these voters were entitled to vote by absentee ballot pursuant to AS 15.20.010(3), but argue that these voters were not entitled to obtain absentee ballots by personal representative.

AS 15.20.010(3) allows a voter to vote by absentee ballot "if he believes he will be unable to be present at the polls because of the physical inaccessibility of the polling place causing undue travel expense, hardship, or hazard to [him]."[23] Each of

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23. AS 15.20.010(3).

these registered voters at Prudhoe Bay met this standard.[24] Other

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24. No election district or polling place had been established at Prudhoe Bay. We agree with the superior court's conclusion that it was not malconduct for Lt. Governor Thomas to fail to establish a voting precinct at Prudhoe Bay, because he could have reasonably concluded that there were not sufficient permanent residents there to merit a voting precinct or that voters residing there were registered elsewhere in the state. See AS 15.10.050.

statutory sections provide that a "qualified voter" may apply in person, by personal representative, or by mail for an absentee ballot.[25] Yet another

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25. AS 15.20.060-70. Application in person or by a representative may be made to certain election officials in either the election district or precinct in which one is registered to vote. If time does not permit the voter to apply in this manner or by mail, he may apply for an absentee ballot in person or by a personal representative to any election supervisor. AS 15.20.065. The Prudhoe Bay voters here applied to the election supervisor in Fairbanks.

statutory section, AS 15.20.150, provides the methods by which a ballot obtained through a personal representative or by mail may be case. In addition to technical standards designed to authenticate such a ballot,[26]

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26. The voter "may proceed to mark the ballot in secret" in the presence of an attesting witness who is at least 18 years of age. The ballot is then to be placed in "the small blank envelope," which is in turn placed in a larger envelope to which is attached the "voter's certificate" signed in the presence of either certain officials or the attesting witness.

this section provides that the ballot may be returned by personal representative to the election official who provided it or by the "most expeditious mail service, postmarked not later than the day of the election, to the election supervisor in his district.[27]

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27. The evidence showed that some of these ballots which were cast were returned by personal representative and others returned by mail.

It was on these general provisions concerning personal representative absentee voting that election officials based their decision to issue the absentee ballots in question to registered voters at Prudhoe Bay who were qualified to vote by absentee ballot. However, AS 15.20.120(a), specifying the basis on which an election official is to make the decision to issue an absentee ballot to a designated personal representative, injects confusion into the statutory scheme. This section provides that the voter's application for such a ballot must be "signed by the applicant and . . . accompanied by a lketter from a licensed physician or a statement signed by two

qualified voters stating that the applicant will be unable to go to the polling place because of physical disability." While this section is anomalous and difficult to integrate consistently into the statutory scheme of provisions detailing the issuance and use of personal representative absentee ballots, it is the only section of the chapter which provides election officials with explicit standards for their decisions to issue such ballots. For this reason the superior court was arguably correct in its conclusion that personal representative absentee ballots should be issued only where the requisite showing of "physical disability" is made by the voter.[28] The superior court

28. The statutory sections governing absentee ballot voting by personal representative are confusing and unclear. We strongly recommend that the legislature expressly define the requirements which a voter must meet in order to obtain and cast an absentee ballot by personal representative.

found that none of these Prudhoe Bay voters were in fact "physically disabled."

However, we do not conclude, as did the superior court, that the decision to issue these ballots amounted to an act of malconduct by election officials. These ballots were issued as a result of the good faith attempt by those officials to interpret and implement an ambiguous statutory scheme providing for personal representative absentee ballots.[29]

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29. Election officials interpreted AS 15.20.120(a) as specifying only one basis for the issuance of absentee ballots to personal representatives. They considered physical inability to get to the polls an equally valid rason in light of the language in other sections of the statutory scheme. They used application forms which

certified the voter as "unable to go to the polling place due to physical disability" for both types of ballot requests. They informed the personal representatives involved here that this form had not been changed in years, but as a matter of practice was used for requests based on either physical disability or inability.

The purpose and effect of this interpretation was to allow properly registered Alaskan voters, who otherwise might have been unable to register their political preferences, to vote by absentee ballot. There was no evidence that the election officials were motivated by bias or a partisan desire to influence the outcome of the election. As the superior court concluded, the decision to issue these absentee ballots to the Prudhoe Bay voters' personal representatives "arose from commendable intentions or good faith by the election officials involved." For these reasons, we cannot hold that election officials significantly deviated from a statutory mandate in a way that was knowingly or

recklessly indiffferent to that mandate.[30]

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30. Since we have concluded that these actions by election officials did not constitute "malconduct", we need not decide whether they affected the results of this contested election.

14. ABSENTEE BALLOTS

As 15.20.150 provides an absentee ballot is to be marked by the voter and placed in a small blank envelope. The voter then places the small envelope in a larger envelope, and signs the voter's certificate on the back of the larger envelope in the presence of an election official or some other witness. The date that this is done is shown on the certificate. AS 15.20.150 also requires in part that an absentee ballot be postmarked not later than the day of the election.

As 15.20.170 provides that an election official shall stamp on the outer or larger of the two envelopes containing the voter's certificate or

oath the date on which the ballot is received in his office.

The parties have stipulated for purposes of appeal that certain absentee ballots did not meet one or the other, or both of the above requirements relating to postmarking and stamp dating by election officials. Appellees contend that the postmark and date stamp requirements are mandatory, and that election officials committed malconduct by counting such ballots.

The state has conceded that 35 ballots were counted in contravention of statutory requirements. The absentee ballots which remained in question before the superior court amounted to more than 2500.

The regional canvass board has

the responsibility for determining the validity of absentee ballots before they are counted. The board is directed not to count certain absentee ballots as specified in AS 15.20.210. The failure of the absentee ballot to be proprly postmarked or dated when received by an election official is not included as a violation of the absentee ballot statute mandating the canvass board to invalidate the ballot.

The superior court properly concluded that the provisions regarding postmarking and date stamping by an election official were not mandatory, and refused to reverse the determination of the regional election boards. The court did, however, conclude that "election officials have disregarded the statutory

scheme in a way that impels this court to its ultimate conclusion of cumulative malconduct."

We hold that except for the 35 ballots conceded to by the state as having been improperly counted, there was no malconduct. The purpose of AS 15.20.150 and of AS 15.20.170 is to provide methods by which to insure that absentee ballots have been cast on or before the election day. All absentee ballots in question here were objectively determined to have been cast on or before the election day. The mandatory requirement that ballots be marked on or before election day is satisfied by a date received stamp, or a postmark, or the date of witnessing of the voter certificate, or any combination of

these.

15. ONE WITNESS SIGNATURE ON ABSENTEE BALLOT

Appellees contend that certain absentee ballots should not have been counted because in each case the voter's certificate on the back of the absentee ballot envelope had the signature of only one attesting witness. They contend this was in violation of AS 15.20.150 which they allege requires the signatures of two witnesses.

The court below found that AS 15.20.150 was amended by §1 ch. 16 SLA 1977 to elminate the requirement of two witnesses for absentee ballots cast by mail or personal representative. The new version of the statute allows casting of an absentee ballot "in the presence of

an attesting witness . . . ." (emphasis added) Confusion has arisen because in the amended version of the statute there remains language from the old statute

which refers to a now deleted portion, and to "attesting witnesses." (emphasis added) The use of the plural form of the work "witness," we determine, was a legislative oversight - an error in drafting. See Informal Opinion of the Attorney General (3/30/77).

The superior court concluded that the clear intent of the legislature is that a single witness is sufficient and that the ballots with a single witness signature were properly counted. We agree with that conclusion. There is no malconduct involved.

16. COMPUTER BREAKDOWN

On election evening, the State of Alaska, Department of Administration computer was designated to process

punch card ballots from the Juneau district. Shortly after processing began, problems developed with this computer. It was decided by the Data Processing Review Board that the Department of Labor computer, located in the same room, should be used instead.

Processing was begun on the Labor Department computer, and eight precincts were tallied before this computer also developed problems. By that time, the problems with the Department of Administration computer had been corrected. The Data Processing Review Board decided to complete the Juneau tally on that computer. This was done and calculation of the totals was completed using the summary cards and reports from both of the computers.

There is no indication that these calculations or the final totals were incorrect or inaccurate.

Both appellees and appellants agree that election officals violated provisions of AS 15.20.690. That statute requires (inter alia) that when a computer malfunctions during processing, necessitating removal of ballots to an alternate computer, all of the ballots shall be counted at the alternate site, including those already counted at the main location. (AS 15.20.690(b)).

In addition to that requirement, AS 15.20.690(c) directs that all computer tapes resulting from the aborted counting operation shall be erased and the summary cards destroyed.

The superior court determined that these provisions are only technical requirements, violations of which should

not cause disenfranchisement of such a large segment of the voting population.

We hold that the facts depicted indicate no significant deviation from a prescribed norm and we therefore conclude that there is no malconduct as to this issue.

17 PUNCH CARD BALLOTS

Appellees' contention on appeal that questioned or challenged ballots should have been cast on paper rather than punch card ballots has been disposed of by our order of October 6, 1978, in Carr v. Thomas, No. 4261. There, we concluded that it was not illegal to count certain questioned or challenged ballots merely because they were cast on punch card ballots. In the context in which this question is

raised, punch card ballots are not distinguishable from paper ballots: the questioned and challenged punch card ballots were processed in the same manner as questioned and challenged paper ballots. Functionally, this satisfied the requirement of AS 15.15.215(a) to seqregate challenged and questioned ballots until a determination as to their validity could be made.

18. EARLY COUNT OF PUNCH CARD BALLOTS

We agree with the superior court's conclusion that the early count of punch card ballots was permissible and did not constitute malconduct. AS 15.15.330 authorizes the early counting of paper ballots in precincts having 300 or more voters, which have been de-

signated by the lieutenant governor. This early count provision also applies to punch card ballots, since we have decided that a punch card ballot is a form of paper ballot. (See discussion of use of punch cards for challenged and questioned ballots supra.) Punch card ballots are not distinguishable from paper ballots, either in the context of early counting or in the context of segregation of questioned and challenged ballots. The statutory distinction is rather between paper ballots and machine ballots. Under AS 15.15.330 paper ballots, including punch card ballots, may be counted early.

Under the authority of AS 15. 15.010 and 15.15.330, the lieutenant governor has promulgated regulations

which govern the early counting of ballots. See 6 AAC 23.010-070. These regulations were presumably promulgated in accordance with the Administrative Procedure Act, AS 44.62.010-650, as required by Coghill v. Boucher, 511 P.2d 1297 (Alaska 1973), and the early count was carried out in substantial compliance with them. We therefore hold that the early count of punch card ballots was authorized by statute and properly conducted under the applicable regulations.

19. CHANGE OF NAMES - MARRIED WOMEN

A number of women voters[31] attempted to vote under their married names when they had been previously registered under their maiden names. Their votes were rejected.

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31. The Report of the Special Master indicates that 20 married women were not allowed to vote because they attempted to vote under their married names rather than their maiden names under which they were registered. The Memorandum Decision of the superior court indicated that 14 votes were affected.

Appellees contend that AS 15.07.070 imposes a duty upon the lieutenant governor to promulgate rules and requlations to enable voters to register, and that he did not fulfill his duty with regard to informing newlyweds of the necessity of notifying the lieutenant governor of their change of names.

A person who changes his or her name will invariably need to notify various agencies in order to modify documents. There appears to be no affirmative duty on the part of the lieutenant governor or other election officials to inquire as to whether such a change of name has occurred. A voter whose name is changed by marriage may vote under

her married name, she must notify the lieutenant governor at least 30 days before an election so that her registration may be amended to reflect the change. AS 15.07.090(a). This information was set forth in the Alaska Voter Handbook.

The failure of the lieutenant governor to further notify recently married women of the necessity of their advising him of their change in name under AS 15.07.090(a) does not constitute malconduct.

20. THE PROCEEDINGS OF THE 1977 LEGISLATIVE SESSION AND THEIR ASSERTED RELEVANCE TO THE ISSUE OF SCIENTER ON THE PART OF THE LIEUTENANT GOVERNOR AND OTHER ELECTION OFFICIALS

Appellees argue that the proceedings of the 1977 Legislature reflect that the lieutenant governor sought changes in Alaska's election code which would have allowed cross-district voting, the early counting of punch card ballots, and the use of non-election board members to transport punch card ballots. Based upon the foregoing, appellees further agrue that the lieutenant governor was aware that the election code did not permit the aforementioned procedures without prior legislative sanction.

Legislative records reveal that two of the three bills which were

introduced in the 1977 Legislature pertaining to election code reform were never reported out of committee. The single piece of electoral legislation which was enacted during the 1977 legislature was vetoed by the governor. In his veto message to the Speaker of the House, the governor wrote, in part: "The objections to this bill all relate to those sections which provide for election-day registration of voters . . . ."[32] Given the foregoing, we find unimpressive appellees' attempt to use the 1977 legislative proceedings to demonstrate that the lieutenant governor, and other election officials, were guilty of malconduct in carrying out the 1978 primary elections.[33]

32. The legislation which was vetoed also provided for cross-district balloting.

33. Though the governor's action in vetoing a bill constituted a part of the legislative process and may therefore be considered in determining legislative intent, Shelton Hotel Co., Inc. v. Bates, 104 P.2d 478 (Wash. 1940); 2A C. Sands, Sutherland Statutory Construction § 48.05, at 201 (4th ed. 1973), rejecting a bill by the governor or the legislature is not always persuasive of a legislative decision not to change existing law. The rejection "may be due . . . to the belief that the proposed provision would be mere surplusage," or it might have been intended for clarification of an existing act. Roderick v. Sullivan, 528 P.2d 450, 455 n.13 (Alaska 1974) (citations omitted). See People v. Puritan Ice Co., 151 P.2d 1 (Cal. 1944); Standard Oil Co. v. Johnson, 147 P.2d 577 (Cal. 1944). The governor's veto message was addressed only to election day registration, there is no basis for construing a specific legislative intent to change the law with respect to the other enacted portions of the bill.

CONCLUSION

Although at this time the court is not able to determine the prevailing candidates in the Merdes-Croft-Hickel-Hammond races, it is apparent, barring a contest resulting in a tie vote, or the reallocation of votes due to irregularities sufficient to change the results, that a general election should be held on November 7, 1978. As soon as is practicable, the votes for the respective candidates involved in the election contest and recount cases will be recomputed and certified pursuant to the terms of this memorandum and order and the separate order which will be entered in the recount case. Therefore, in order to insure the integrity of the

forthcoming general election, the following specific further orders are entered:

1. The lieutenant governor is authorized to post the names of all registered voters, required by AS 15.07.140, as late as 10 days before the general election;

2. The lieutenant governor is authorized to conduct the staff training programs, required by AS 15.07.140, as late as 10 days before the general election;

3. The lieutenant governor is authorized to distribute sample and official ballots, original registers, duplicate registers and other forms and supplies to election supervisors, as required by AS 15.15.050, as late as 10

days before the date of the general election;

4. The lieutenant governor is authorized to distribute the election pamphlet, as required by AS 15.57.030 and AS 15.57.050, as late as 10 days before the general election;

5. The lieutenant governor is authorized to announce the general election, as required by AS 15.05.070, by publication of the date and nature of the election as late as 10 days before the general election;

6. The lieutenant governor is authorized to make absentee ballots available to voters, as required by AS 15.20.080, as late as 10 days before the general election;

7. The lieutenant governor is authorized to have available for distribution, as required by AS 15.20.080, all personal representative ballots, as late as 10 days before the general election;

8. The lieutenant governor is authorized to distribute absentee ballots for redistribution by election officials, aas required by AS 15.20.040, as late as 5 days before the election.

Dated at Anchorage, Alaska, this 20th day of October, 1978.

Jay A. Rabinowitz

Roger G. Connor

Robert Boochever

Edmond W. Burke

John Dimond

APPENDIX

TABLE 1

ALLOCATION OF 88 INVALID VOTES FROM STATE'S MEMO (pg. 85) TO BE DEDUCTED FROM CANDIDATES HAMMOND AND HICKEL

District	Illegal Votes	Allocated to Hickel	Allocated to Hammond	Other
1	2	0.91	0.37	0.72
2	7	2.08	2.02	2.80

3	0	-	-	-
4	2	0.35	0.87	0.79
5	4	1.57	1.00	1.42
6	6	1.87	1.20	2.93
7	2	0.61	0.50	0.89
8	1	0.31	0.22	0.47
9	1	0.33	0.21	0.47
10	1	0.35	0.23	0.42
11	3	0.96	0.77	1.27
12	1	0.37	0.23	0.40

13	5	1.55	1.62	1.84
14	2	0.50	0.89	0.61
15	5	1.24	1.50	2.27
16	3	0.54	1.57	0.89
17	6	0.92	2.80	2.28
18	10	1.91	4.25	3.84
19	17	6.14	5.05	5.81
20	5	1.31	1.88	1.82
21	3	0.53	1.27	1.20
22	2	0.50	0.78	0.71

TOTAL	88	24.95	29.23	33.85

1. This proration may have to be altered as a result of the counting of 249 ballots.

APPENDIX

TABLE 2

TOTAL ALLOCATION OF 97 INVALID BALLOTS - SEVEN INVALID - TWO TO BE ADDED BACK IN - NET OF 5 DIFFERENT FROM TABLE 1 - ASSUMING ALL SEVEN ADDITIONAL BALLOTS AND THE TWO DEDUCTED ARE ALL FROM ONE DISTRICT

District	Total 97 Vote Allocation for Hickel	Hammond	Other
1	27.22	30.15	35.66
2	26.51	30.68	35.85
3	26.03	31.35	35.66

4	25.83	31.41	35.80
5	26.92	30.48	35.63
6	26.51	30.23	36.30
7	26.48	30.48	36.08
8	26.51	30.33	36.19
9	26.58	30.27	36.18
10	26.71	30.39	35.94
11	26.59	30.51	35.97
12	26.75	30.37	35.87
13	26.50	30.85	35.69

14	26.21	31.46	35.37
15	26.19	30.73	36.12
16	25.86	31.85	35.33
17	25.72	31.57	35.75
18	25.91	31.36	35.77
19	26.76	30.72	35.56
20	26.26	31.11	35.67
21	25.83	31.34	35.89
22	26.19	31.19	35.65

High	27.22	31.85	36.30
Low	25.72	30.15	35.33
Average	26.37	30.86	35.82
Median	26.49	30.70	35.88

Thus, based on the average, the number of votes to be deducted from candidate Hickel is 26 and from candidate Hammond, 31. A similar computation should be utilized to determine the deductions from candidates Merdes and Croft.

THE SUPREME COURT OF THE STATE OF ALASKA

WALTER J. HICKEL and EDWARD A. MERDES, Appellants,	)	File No. 4251
v.	)	ORDER
LIEUTENANT GOVERNOR LOWELL THOMAS, JR., et al., Appellees.	)	

The matter having come before the court upon the "Report of the Special Master" and the objections thereto of the respective parties and the court being advised in the premises;

IT IS HEREBY ORDERED.

1. In regard to the noncandidate appellees' objections to the Special Master's specific ballot determinations the following rulings are made:

(a) Completely filled in boxes: The objection is sustained. Boxes marked in such manner are to be counted.

(b) Boxes completely filled in over prior mark: The objection is sustained. Ballots marked in such manner are to be counted.

(c) Punch card ballots punched either immediately above the first candidate in the list or immediately below the last candidate: The objection is overruled. Ballots punched in such a manner are not to be counted.

(d) Punch card ballots marked with a pen or pencil rather than being punched: The objection is sustained. Punch card ballots marked in pen or pencil are to be counted.

(e) Punch card ballots marked in pen or pencil and then punched in the same square: The objection is sustained. Punch card ballots marked and then punched are to be counted.

(f) Punch card ballots punched both immediately above the first square in a list of candidates and in the first square of the list of candidates: The objection is sustained. Ballots punched is such circumstances are to be counted.

2. In regard to the response of Chancy Croft to the Special Master's report the following rulings are made:

(a) The question of the Prudhoe Bay ballots has been determined by this court's memorandum and order in the election contest case;

(b) The question of the 249

ballots has been determined by this court's memorandum and order in the election contest case;

(c) The question of counting ballots with particular types of markings is governed by paragraph number 1 of this order and any other applicable portions of this order and the court's memorandum and order.

3. In regard to the response of appellants Hickel and Merdes to the report of the Special Master the following rulings are made:

(a) All exceptions raised in paragraphs numbered 1 through 29 of appellants' response (with the exception of paragraphs number 11 and 19) are overruled;

(b) As to the exceptions

contained in paragraphs number 11 and 19 the question of counting ballots with particular types of markings is governed by paragraph number 1 of this order and by any other applicable portion of this order and the court's memorandum and order.

4. In regard to the objections of Governor Hammond to the Special Master's report the following rulings are made:

(a) The objections concerning the counting of ballots with particular types of markings are governed by the rulings made in paragraph number 1 of this order and any other applicable portion of this order as well as the court's memorandum and order.

5. With the exceptions previously noted in the preceeding paragraphs of

this order and in the memorandum and order the findings and recommendations contained in the Special Master's report are affirmed and adopted.

6. The matter is remanded to the Lieutenant Governor to complete the recount in accordance with the provisions of this order and this court's memorandum and order entered heretofore in the election contest case. More specifically the Lieutenant Governor is to count, in the manner provided by law, the 249 ballots and to revise his recount determinations of ballot markings in accordance with paragraph 1 of this

order.[1]/ Upon completion of the foregoing procedures the Lieutenant Governor is to forthwith file and publish an amended certification of recount.

Dated at Anchorage, Alaska this 20th day of October, 1978.

/s/ Jay A. Rabinowitz

/s/ Roger G. Camor(sp.)

/s/ Robert Buckalew(?)

/s/ Edmond T. Burke

/s/ John H. Dimond

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[1]/ The 249 ballots are discussed in detail in this court's memorandum and order heretofore entered in the election contest case.

APPENDIX C

THE SUPREME COURT OF

THE STATE OF ALASKA

JAY HAMMOND, et al.	)
	)
Appellants,	)
	)
v.	)
	)
WALTER J. HICKEL, et al.	)
	)
Appellees.	)
	)

File Nos. 4281, 4282, 4283, 4284, 4285, and 4291

ORDER

Before: Rabinowitz, Chief Justice, Conner, Boochever and Burke, Justices, and Dimond, Senior Justice. [Matthews, Justice, not participating.]

On consideration of the petition for rehearing, lodged October 30, 1978 and filed November 2, 1978,

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court at Juneau, Alaska, on November 20, 1978.

CLERK OF SUPREME COURT

Robert D. Bacon

cc: Justices
Counsel
The Hon. Ralph E. Moody
Arthur H. Snowden, II
James Babb

APPENDIX D

IN THE SUPREME COURT

FOR THE STATE OF ALASKA

JAY HAMMOND, et al.,

Appellants,

-vs-

WALTER J. HICKEL, et al.,

Appellees.

WALTER J. HICKEL, et al.,

Cross-Appellants,

-vs-

LOWELL THOMAS, JR., et al.,

Cross-Appellees.

Nos. 4281, 4282, 4283, 4285 and 4291 (Consolidated)

PETITION FOR REHEARING

Edgar Paul Boyko, Esq.
Henry J. Camarot, Esq.

Attorneys for Petitioners

PETITION FOR REHEARING

Appellees and Cross-Appellants hereby petition for a rehearing, pursuant to Rule 27(a) of the Appellate Rules, upon the grounds therein set forth and hereinbelow specifically designate those portions of the memorandum and order dated October 20, 1978, the opinion below and the briefs, which petitioners wish the court to reconsider.

1. This court should not have substituted its judgment for the findings of the trial court based upon testimonial and documentary evidence, that the primary election of August 22, 1978, was "so permeated with numerous serious violations of law, not individually

amounting to malconduct, that substantial doubt will be case on the outcome of the vote." (Memorandum, p. 5; Appellees' Brief, pp. 5-7).

2. The trial court had before it and resolved conflicting opinions of experts with respect to the valididty of applying statistical methods in an effort to reconstruct the election and to determine the bias inparted to it by the malconduct. The trial court, as finder of fact, determined that no valid statistical determination was possible. This court substituted its own judgment and accepted the mathematical method rejected by the finder of the facts, without holding

those findings to be clearly erroneous. This was contrary to estabilised standards of appellate review. (Mem. p. 7 and Appendix, Tables 1 and 2; Appellees Brief, pp. 5-7; Opinion below, p. 44; Affidavits of Prof. Katz, Tim Downs and Herbert Robbins).

3. With respect to the so-called Taylor West affair, the court relied on facts which are not supported by the record, specifically: (1) that West's possession of the ballots was "technically lawful under A.S. 15.55.050 and A.S. 15.16.010 (13)", because it is uncontradicted that Taylor West could not be an "election official", since he was under age; that the

Taylor West car remained locked during the entire time the ballots wer in it, when in fact, West testified that the car was unlocked at various times and that during the time that it was locked, another (unidentified)person had a key. Hence it was improper to conclude that "there was no evidence that the ballots had been disturbed or tampered with during the time that they were in West's custody." Moreover, the test is whether there was an opportunity for such tampering, which, having once been established, requires an affirmative showing to the contrary (Appellees Brief, pp. 58-62). Hence, upward of at least 2,130 ballots should have been

invalidated.

4. The court failed to address at all the issue as to how mutilated or missing ballots could be counted in a "recount", nor the fact that in the same recount otherwise improperly marked or mutilated ballots were in fact rejected, in derogation of similar election certificates as those from Kwethluk and Kotlik, which alone were given undiminished effect as part of the recount. This amounts to a discriminatory treatment of the election certificates from these two precincts, as against all other precincts where the election certificate was in fact overridden by the actual count of the physical

ballots. It thus violates the constitutional equal protection guarantees, and in addition it opens the door wise to deliberate fraud in future elections.

5. Once again this court summarily overruled findings of fact, made by the trial court after hearing contradictory demeanor evidence and expert testimony, with respect to the 247 questioned ballots from District 6, without finding clear error. While this court did and properly could adopt a more liberal standard (Memo. p. 12), its conclusion that "the state had met its burden of proof, by a perponderance of the evidence, that the ballots were not the instrument

of fraud and that it was probable that they had not been tampered with" (Opinion, p. 11) is not supported by the record. The statement that "We note the circumstance that if someone had tampered with the ballots it would be unlikely that he would put them in a place where they would not be discovered until after the election contest had commended" (Opinion, p. 11), reveals a degree of appealing innocence. If the officials in charge of the election were acting fraudulently (something which under the circumstances is not susceptible of proof), they would have known right after the state canvass, that the "misplaced" 247 ballots were "not

needed". Had it not been for the audit forced upon the state by the appellees they probably would never have surfaced. Had the canvass shown a different result, those ballots were readily available to be further "adjusted" as the need arose. As it turnes out, District 6 which went heavily for Hickel over Hammond on election night, produced an even split of Hammond and Hickel votes from the questioned 247 ballots. Here again, the doors remaind wide open for future deliberate election fraud.

6. The court totally ignored the fact found by the trial court, that no uniform regulations or standards were adopted by the Lt.

Governor for cross-precenct and cross-district voting and hence large numbers of voters were treated in an unequal and discriminatory fashion. Apparently, with the sanction of the highest court of the state, this same malconduct will now be repeated in the general election.

7. The factual assumption that candidates had waived the effect of illegal cross-district voting is totally unsupported by the record. On the contrary, one of the candidates attempted to mount a challenge in the Superior Court and to set a specific time and place within which to challenge questioned ballots, but was rebuffed

at the insistence of the state. Other undisputed evidence submitted to both the trial court and this court suggests that candidate observers were not allowed to challenge the validity of either absentee or questioned ballots at the state canvass. By the time of the recount these had been commingled and it was impossible to do so. Moreover, this court did not address the contention that the public's right to a lawful and free election cannot be estopped (Appellee's Brief, p. 74; and see, Merdes v. Thomas, Superior Court Third District, Case No. 3AN-78-5816; Mem. pp. 16-21). The statement that there is "no evidence of non-uniform enforcement

sufficient to constitute malconduct" (Mem. p. 20), flies directly into the face of the record and violates appellees' constitutionally protected due process and equal protection rights.

8. The rulings of this court with respect to voter registration (Mem. p. 22 -24) would be totally inexplicable, but for the almost impossible time constraints under which both the court and counsel were operating in the resolution of this case. Since this holding leaves some of the basic safeguards, applicable not only to state but also to national elections, in a total shambles, it is vitally important that this court reconsider

this matter and give it the careful attention it most assuredly deserved.

9. The holding of this court that "the mandatory requirement that ballots be marked on or before election day is satisfied by "the date of witnessing of the voters certificate," in effect, substitutes a voluntary "honor System", for what the legislature must clearly have intended to be either a double check or perhaps a triple check against the temp tation to vote an absentee ballot after election day, particularly when your candidate appears to be losing. Again, without a doubt, due to time constraints, this court has stated neither precedent nor any logical rationale

for thus amending the clear and unequivocal language of this mandatory statutory scheme. This ruling leaves a gaping hole in the existing statutory safeguards and should be promptly reconsidered (Me. pp. 28-29).

10. The court does not address at all the fact that the "early count" of punch card ballots regulations promulgated by the Lt. Governor and followed by election officials violates a host of specific statutes, carefully designed by the legislature to safeguard the security of these easily manipulated ballots. In fact, the court's memorandum doesn't even refer to these mandatory laws, which are set forth in Article

5 of Chapter 20, Title 15 of Alaska Statutes and which were deliberately and systematically violated by the socalled "non-candidate" appellants. Unless and until this matter is properly addressed by this court, the entire legislative scheme and hence the security and validity of about half of all ballots cast in the state remain in critical jeopardy.

11. This court has not addressed at all, the important federal questions (which are also valid issues under Alaska's state constitution), set forth in appellees' brief, at pp. 104-107). This, once again, can only be explained as a result of the pressures of time. Yet, there existed no compelling reason, even

if the court decided to overturn the trial court's determination that a new primary must be held because of cumulative malconduct, that the general election for Governor of Alaska had to take place on November 7, 1978, desirable as that might be. Accordingly, to brush off so lightly, so many important basic issues, as did the memorandum opinion of this court and, more importantly, to leave open and unprotected, so many loop-holes in a comprehensive legislative scheme to assure fair and honest elections (which the legislature must obviously have adopted in contemplation of the inherent "conflict of interest" arising from

the delegation of supervisory and administrative duties to a partisan candidate for statewide office) was not an adequate exercise of that profound judicial responsibility which rests upon the highest court of a sovereign state. Also, further clarification is needed as a guide to the trial judge for future proceedings after remand.

12. In denying his requested disqualification, the Chief Justice and the court failed to comply with A.S. 22.20. 020(c).

Accordingly, this Petition for Rehearing should be granted and an opportunity afforded to petitioners to submit supplemental briefs, in accordance with Appellate Rule 27.

DATED this 28th day of October, 1978.

By: _____
EDGAR PAUL BOYKO

By: _____
HENRY J. CAMAROT

Attorneys for Appellees/
Cross-Appellants

I hereby certify that a copy of the foregoing was served on the Attorney General's Office, Robert Wagstaff, Esq. and Douglas Pope, Esq. this 30th day of October, 1978.

By: _____
Edgar Paul Boyko

cc: Fred Dichter, Esq.
Roger McShea, Esq.

APPENDIX E

XV

THE STATE VIOLATED STANDARDS OF EQUAL PROTECTION AND DUE PROCESS BY ALLOWING CERTAIN VOTERS TO VOTE WHILE DISENFRANCHISING OTHERS WITHOUT PROMOTING ANY COMPELLING STATE INTEREST OR IN FACT WITHOUT ANY RATIONAL BASIS

In the August 22 primary, inconsistent and discriminatory practices denied otherwise qualified voters the free exercise of their franchise. The state's own confused policy towards cross-district and cross-precinct voting caused certain voters to be denied their franchise by being sent away from the polls. Other voters who filed the proper requests were not mailed their absentee ballots. In three villages, Hyder, Stony River and Lime Village election boards were never appointed and as a result polls were never established. The election office arranged to allow the voters in

these areas to exercise their franchise through absentee ballots. However, ballots were never provided and all citizens of these villages were completely disenfranchised. Twenty "newly married maidens" seeking to vote under their new names were informed that they could not vote since they had not re-registered, and were not notified that they might vote under their old registration. Due to the extreme careless ness and disregard of the election laws, the aforementioned citizens were disenfranchised by the State, in violation of the guarantees of due process of law and the equal protection of the law, under the constitutions of Alaska and of the United States.

The political franchise of voting is a fundamental right which is preservative

of all rights, Yick Wo v. Hopkins, 118 U.S. 356 (1886). The United States Supreme Court held in Dunn v. Blumstein, 405 U.S. 330, 837 (1971) that when the right to vote is granted to some citizens and the franchise denied to others, "the Court must determine whether the exclusions are necessary to promote a compelling State interest." In the instant case, the State cannot demonstrate that the exclusion of the voters was necessary to promote a compelling State interest. The State can demonstrate no interest served by the mass disenfranchisement of voters primarily because the disenfranchisement was not part of a scheme, classification or adherence to mandates of election laws, but was due solely to the careless manner in which the election was conducted.

This is not to say that a state does not have power to regulate or use its discretion in limiting the franchise in appropriate circumstances and manner. However, the United States Supreme Court has carefully guarded this fundamental right and has protected the exercise of this right by strictly limiting the manner in which a state may interfere with the individual's exercise of his franchise. Not only must there limits be legislatively imposed, rather than left to the discretion of the election officials at the poll level, but "as a general matter, before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests viewed by it must meet close constitutional scrutiny. "Dunn v. Blumstein, supra, at 336. The Dunn court

states that in decision after decision "this Court has made it clear that a citizen has a constitutionally protected right to participate in elections on an equal basis in jurisdiction." Id at 336. That right cannot be protected when the arbitrary actions of election officials govern and are conclusive decisions as to whether one voter, may exercise his franchise within the same precinct. This was the effect of the unbridled discretion given to election officials in the August 22nd primary and, as a result, voters were disenfranchised in an arbitrary and capricious manner.

In Kramer v. Union Free School District, 395 U.S. 621 (1970), the U.S. Supreme Court concurred with the analysis previously set out in Reynolds v. Sims, 337 U.S. 533, by holding that the exer-

cise of the franchise is preservative of all other basic civil and political rights. Hence, the Court re-emphasized, that any infringement of this right must be carefully and meticulously scruitinized.

> "This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discriminations in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." 395 U.S. 621, 626

The Cramer court warned that practices "granting the franchise...on a selective basis always pose the danger of denying some citizens any effective voice

in governmental affairs which substantially effect their lives." Cramer, Page 627.

That the State's violations of the fundamental equality of the franchise in this election, probably were not the result of any deliberately discriminatory policy does not make them any more acceptable. The rights of voters are so important, and so necessary to the preservation of all other rights, that the state is under an affirmative duty to insure full access to the ballot for all qualified voters. There is no basis for this Court to find that the state properly interpreted the election laws, without also holding that the voting rights granted therein were so unequally applied as to deny to many voters, their constitutionally guaranteed rights to due process and the equal protection of the law.

CONCLUSION

The Court has before it the anatomy of an election. Appellants would have you fragment and segment the totality of what occurred and argue that each slide of a specimen of irregularity, impropriety or violation of statute, examined by itself, under the judicial microscope, can not be shown, conclusively to be fatal to the integrity of the election.

Such an approach would be not only fallacious but irresponsible. The August 22 primary election was not a cummulation of individual antlike motions by unconnected particles.

It had its beginning and roots in the shambles of the registration scheme, mandated in 1975 by the Alaska Legislature and totally ignored by the Lieutenant Governor. It was twisted and marred, as the trial

court found, by chaos, confusion, breaches of security, unequal treatment of voters, and by breakdowns and mishandling of relatively new and untried computer equipment and techniques. It was further distorted by glaring inconsistencies and discrepancies, an improperly conducted recount, a hasty (and apparently officially for-ordained) certification, and an unprecedent post-certification audit, forced upon a reluctant administration by an aggressive election contest. As a result of this, more hither to uncounted ballots kept turning up periodically under circumstances designed to alarm and disgust the voting public.

Now the representatives of the malfeasant election officials and their favorite candidates having, marched confidently into a trial with reams of docu-

ments and volumes of testimonial evidence and legal arguments - and having deservedly lost on the merits, for cogent reasons set forth in a carefully documented decision, are pleading with this Court to put Humpty Dumpty together again.

It cannot be done by the ordinary process of legal rationalization. Thus the appellants are, at least inferentially, asking this Court for a political decision - a kind of clubby selection, among share of politicial power, of the "right" candidates for governor.

Appellees are confident that this Court will not take the bait no matter how attractively packaged. The public confidence, having been severely shaken by the repeated public disclosures of carelessnexx with the public's most sacred trust - and that out of the mouths of the very of-

ficials in charge of the election - must inevitably have been finally destroyed by the impartial findings of a respected judge selected with the unanimous consent of all parties, after full disclosure and inquiry.

This is a potentially explosive situation, calling for the highest degree of appellate judicial restraint. All presumptions should be indulged in favor of the agonized decision of the trial judge. No. compelling reasons exist for disturbing it now - but every argument of good government and the effective administration of justice cries out for affirmance.

Respectfully submitted, this 17th day of October, 1978.

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APPENDIX F

ALASKA CONSTITUTION

Article V

Suffrage and Elections

Section 1. Qualified Voters. Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election. A voter shall have been, immediately preceding the election, a thirty day resident of the election district in which he seeks to vote, except that for purposes of voting for President and Vice-President of the United States other residency requirements may be prescribed by law. Additional voting qualifications may be prescribed by law for bond issue elections of political subdivisions. [Amendment approved August 23, 1966; amendments approved August 25, 1970; amendment effective October 14, 1972]

ALASKA STATUTES

A.S. 22.20.020(c) If a judicial officer disqualifies himself or consents to disqualification, the presiding judge of the district shall immediately transfer the action to another judge of that district to which the objections of the parties do not apply or are least applicable and if there is no such judge, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. If a judicial officer denies his disqualification the question shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts or, if none, by the other members of the supreme court. The hearing may be ex parte and without notice to the parties or judge.
(§ 54-2-1 ACLA 1949;am § 1 ch 48 SLA 1967)

CHAPTER 20.
Special Procedures For Elections

A.S. 15.20.010. Persons who may vote absentee. A qualified voter may vote absentee at any election,

(1) if he believes that he will be unavoidably absent from his voting precinct on election day, whether inside the state or not, or

(2) if he will be unable to be present at the pools because of physical disability, or

(3) if he believes he will be unable to be present at the polls because of the physical inaccessibility of the polling place causing undue travel expense, hardship, or hazard to the voter. (§ 4.01 ch 83 SLA 1960)

A.S. 15.20.015. Moving from election district just before election. A person who meets all voter qualifications except that listed in A.S. 15.05.010(4) is qualified to vote by absentee ballot in the election district in which he formerly resided if he lived in that election district for at least 30 days immediately before his change of residence. (§ 2 ch 80 SLA 1963)

A.S. 15.20.020. Provision for general administrative supervision. The lieutenant governor shall provide general administrative supervision over the

conduct of absentee voting and may issue rules necessary to the administration of absentee voting to assure efficiency and encourage voter participation. The lieutenant governor shall issue instructions to absentee voters regarding the procedure for absentee voting. One set of instructions shall accompany each absentee ballot. (§ 4.02 ch 83 SLA 1960)

A.S. 15.20.030. Preparation of ballots, envelopes, and other material. The lieutenant governor shall provide the paper ballots prepared for use at the polls as the absentee ballots. The lieutenant governor shall provide a small blank envelope in which the voter shall initially place the marked ballot, and shall provide a larger envelope, with the prescribed voter's certificate on the back, in which the small envelope with ballot enclosed shall be placed. The lieutenant governor shall prescribe the form of and prepare the voter's certificate, envelopes, and other material used in absentee voting. The voter's certificate shall include an oath, for use when required, that the voter is a qualified voter in all respects, a blank for the voter's signature, a certification that the affiant properly executed the marking of the ballot and identified himself, blanks for the attesting witnesses, and a place for recording the date and time the

envelope was sealed and delivered. (§ 4.03 ch 83 SLA 1960; am § 14 ch 80 SLA 1963)

A.S. 15.20.040. Distribution of ballots, envelopes, and other material. The lieutenant governor shall distribute the absentee ballots, envelopes, and other absentee voting material to the election supervisors for redistribution to the proper election officials before the date upon which a person may first apply for an absentee ballot in person. (§ 4.04 ch 83 SLA 1960; am § 15 ch 80 SLA 1963)

A.S. 15.20.045. Designation of magistrates and others as election officials. The lieutenant governor or election supervisor may designate persons to act as election officials under §§10--220 of this chapter in areas where election supervisors do not have offices. Magistrates may, with the approval of the administrative director of the Alaska Court System, be designated under this section. (§§ 19 ch 197 SLA 1975)

A.S. 15.20.050. Requirement of full public notice. The lieutenant governor shall give full public notice of the dates and manner of voting absentee and may select any means of communication permitted to be used in giving notice of the date and time of the general election. (§ 4.05 ch 83 SLA 1960)

A.S. 15.20.060. Application in person or by a representative. A qualified voter may apply in person or by a personal representative for an absentee ballot to the election supervisor or election official in the election district of the resident voter. (§ 4.06 ch 83 SLA 1960; am § 3 ch 24 SLA 1966; am § 20 ch 197 SLA 1975)

A.S. 15.20.062. Application to election board chairman by personal representative. A qualified voter may apply by personal representative for an absentee ballot to the election board chairman or his designee on election day in the precinct in which he is entitled to vote. (§ 28 ch 116 SLA 1972)

A.S. 15.20.065. Application to election supervisor in person or by representative. A qualified voter may apply in person or by a personal representative for an absentee ballot for state elections for his district at the office of an election supervisor or other cities designated by the lieutenant governor if time does not permit him to obtain an absentee ballot under § 60 or 70 of this chapter. Absentee ballots permitted by this section may be obtained from the office of the election supervisor any time during regular office hours including election day. (§ 28 ch 116 SLA 1972)

A.S. 15.20.070. Application to lieutenant governor by mail. A qualified voter may apply by mail for an absentee ballot to the lieutenant governor. The application shall include the address to which the absentee ballot shall be rturned and the applicant's full Alaska resident address and signature. (§ 4.07 ch 83 SLA 1960; am § 18 ch 136 SLA 1966)

A.S. 15.20.080. Date for application in person. A qualified voter may apply for an absentee ballot in person on any day after the ballots are prepared and available, but not on election day. Absentee ballots shall be prepared and available at least 15 days before the day of any election. Application may be made on election day only in the office of the election supervisor or other cities designated by the lieutenant governor as provided in § 65 of this chapter. (§ 4.08 ch 83 SLA 1960; am § 16 ch 80 SLA 1963; am § 2 ch 26 SLA 1966; am § 29 ch 116 SLA 1972)

A.S. 15.20.090. Date for application by personal representative. A qualified qualified voter may apply for an absentee ballot through a personal representative on the date of, or not more than 20 days before, the date of an election. (§ 4.09 ch 83 SLA 1960)

A.S. 15.20.100. Date for application by mail. A qualified voter may apply for an

absentee ballot by mail if postmarked not more than six months nor less than seven days before any election. (§ 4.10 ch 83 SLA 1960; am § 19 ch 136 SLA 1966; am § 10 ch 38 SLA 1974)

A.S. 15.20.110. Procedure on application in person. Upon receipt of an application in person for an absentee ballot, the election official authorized to issue the ballot shall examine the applicant regarding his qualifications as a voter. If the official is satisfied that the applicant is a qualified voter and may vote absentee, he shall issue the ballot to the applicant. A satisfactory showing that a voter is qualified may be made in the same manner provided for a satisfactory showing of qualifications before an election judge. (§ 4.11 ch 83 SLA 1960)

A.S. 15.20.120. Procedure on application by personal representative. (a) Upon receipt of a written applicatoin by personal representative, the election official authorized to issue the ballot shall provide the ballot and other absentee voting material if the written application is signed by the applicant and is accompanied by a letter from a licensed physician or a statement signed by two qualified voters stating that the applicant will be unable to go to the polling place because of physicial disabiiity.

(b) The election board chairman may issue ballots to personal representatives on election day only in areas where an election official has not been designated to issue absentee ballots. (§ 4.12 ch 83 SLA 1960; am § 30 ch 116 SLA 1972; am § 21 ch 197 SLA 1975)

A.S. 15.20.130. Procedure on application by mail. After receipt of an application by mail for an absentee ballot, the lieutenant governor shall airmail to the applicant the ballot and other absentee voting material when they are ready for distribution, if the application includes the name and both the present address and the full local resident address of the applicant. The larger envelope to be used for returning the absentee ballot to the election officials shall be addressed to the election supervisor in the district in which the voter is a resident. (§ 4.13 ch 83 SLA 1960; am § 1 ch 22 SLA 1966; am § 3 ch 24 SLA 1966; am § 22 ch 197 SLA 1975)

A.S. 15.20.140. Casting vote in person. Upon receipt of an absentee ballot in person, the voter shall proceed to mark the ballot in secret, to place the ballot in the small blank envelope, to place the small envelope in the larger envelope, and to sign the voter's certificate on the back of the larger envelope in the presence of the election official, and return the ballot properly enclosed in

the envelopes to the election official who shall sign as attesting witness. The election official shall not accept a marked ballot that has been exhibited by an absentee voter with intent to influence other voters. If the absentee voter improperly marks or otherwise damages a ballot, the voter may request, and the election official shall provide him with another ballot up to a maximum of three. Improperly marked or damaged ballots shall be destroyed. The numbers of all ballots so destroyed shall be noted on the registration lists. (§ 4.14 ch 83 SLA 1960; am § 31 ch 116 SLA 1972)

A.S. 15.20.150. Casting vote by personal representative or by mail. Upon receipt of an absentee ballot through a personal representative or by mail, the voter whether in or outside the state, in the presence of two attesting witnesses, both of whom are at least 18 years of age, before an election judge, notary public, commissioned officer of the armed forces including the National Guard, district judge or magistrate, United States postmaster, United States assistant postmaster, or other person qualifed to administer oaths, may proceed to mark the ballot in secret, to place the ballot in the small blank envelope, to place the small envelope in the larger envelope, and to sign the voter's certificate on the back of the larger envelope in the presence of the above-listed official or

described persons who shall sign as attesting witnesses. The voter may then rturn the ballot properly enclosed in the envelopes, by personal representative to the election official who provided the ballot or by the most expeditious mail service, postmarked not later than the day of the election, to the election supervisor in his district. (§ 4.15 ch 83 SLA 1960; am § 3 ch 24 SLA 1966; am § 32 ch 116 SLA 1972)

A.S. 15.20.160. Fee prohibited. No person may receive a fee from the voter for attesting to any voter's certificate required in voting absentee. (§ 4.16 ch 83 SLA 1960)

A.S. 15.20.170. Disposition of ballots. Each election official who has been designated by an election supervisor or the lieutenant governor to issue absentee ballots shall stamp on the envelope containing the oath the date on which the ballot is received in his office. All ballots received shall be immediately transmitted by the most expeditious mail service to the election supervisor for his district. (§ 4.17 ch 83 SLA 1960; am § 18 ch 228 SLA 1968; am § 23 ch 197 SLA 1975)

A.S. 15.20.180. Names of absentee voters to be made available. The election supervisors and election officials shall have available for public inspection the

names and addresses of persons who voted absentee. (§ 4.18 ch 83 SLA 1960; am § 19 ch 228 SLA 1968; am § 24 ch 197 SLA 1975)

A.S. 15.20.190. Appointment, duties, and compensation of district canvassing board. Thirty days prior to the date of an election, the election supervisors shall appoint, in the same manner provided for the appointment of election judges prescribed in A.S. 15.10.150, district absentee ballot canvassing boards composed of four members, two from each major political party. The district board shall assist the election supervisors in counting and canvassing the absentee ballots and shall receive the same compensation paid election judges. (§ 4.19 ch 83 SLA 1960; am § 20 ch 228 SLA 1968)

A.S. 15.20.200. Time of district canvass and for counting absentee ballots. (a) On the third day following the date of the election, the election supervisor, in the presence and with the assistance of the district absentee canvassing board shall proceed to count all absentee ballots on hand which were canvassed on the previous day, and shall continue to count without recess until completed. The election supervisor may appoint additional counting boards when considered necessary to assist in the counting of absentee ballots.

(b) Eight days after the date of the election the election supervisor, in the presence and with the assistance of the district absentee ballot canvassing board, shall examine affidavits, count and canvass all additionial absentee ballots plus all challenged ballots without recess, and certify the absentee canvass. (§ 4.20 ch 83 SLA 1960; am § 17 ch 80 SLA 1963; am § 21 ch 228 SLA 1968)

A.S. 15.20.210. Procedure for district canvass. (a) On the second day following the date of election, the election supervisor, in the presence and with the assistance of the district absentee ballot canvassing board shall meet and examine all voter certificates on hand. No ballot shall be counted if the voter has failed to properly execute the certificate, if the witnesses or the officer or other person authorized by law to administer the oath fails to affix his signature, or if the voter fails to enclose his marked ballot inside the small envelope provided. The election supervisor or a member of the district absentee ballot canvassing board may challenge the name of an absentee voter when read from the voter's certificate on the back of the large envelope, ifhe has good reason to suspect that the challenged voter is not qualified to vote, is disqualified, or has voted at the same election. The person making the challenge shall specify the basis of the

challenge in writing. The district board by majority vote may refuse to accept and count the absentee ballot of a person properly challenged. If the absentee ballot is refused, the district supervisor shall return a copy of the statement of the challenge to the absentee voter, and shall enclose all rejected ballots in a separate envelope with statements of challenge. The envelope shall be labeled "rejected ballots" and shall be forwarded to the lieutenant governor with the election certificates and other returns. If the absentee ballot is not refused, the large envelope shall be opened, the smaller, inner blank envelope shall be placed in a container and mixed with other blank absentee ballot envelopes. The mixed small blank envelopes shall be drawn from the container, opened, and the ballots counted according to the rules of determining properly marked ballots as are provided for counting by the election board. Upon completion of the canvass, the election supervisor shall prepare an election certificate of results in the manner provided for the preparation of election certificates by precinct election boards, and shall forward the original certificates and returns to the lieutenant governor no later than the day the district canvass is completed.

(b) Notwithstanding (a) of this section, in instances where a resident of the state has received his absentee

ballot for the wrong election district and his ballot is returned to the election supervisor having jurisdiction over the election district in which he actually resides, the votes cast for statewide candidates and state senate candidates, if the person has voted for candidates from the senate election district in which he resides, shall be counted. Votes for a constitutional amendment or statewide referendum shall also be counted. Votes for other local candidates shall be held invalid. (§ 4.21 ch 83 SLA 1960; am § 22 ch 228 SLA 1968)

A.S. 15.20.220. Procedure for state canvass. When the lieutenant governor and appointed party representatives have completed the canvass of paper ballots cast at the voting precincts and the canvass of voting machine ballots, they shall proceed to canvass the absentee ballot votes counted by the district canvassing board. The canvass of the absentee ballot vote counted by the district canvassing board shall be accomplished by reviewing the tallies of the recorded vote to check for mathematical error and by comparing the totals with the election certificate of results. (§ 4.22 ch 83 SLA 1960)

A.S. 15.20.230. Authorization of use. Voting machines may be used in any election. (§ 4.41 ch 83 SLA 1960)

A.S. 15.20.240. Authorization of purchase with local funds. A city council, borough assembly, or the state may purchase or rent any voting machine that meets the minimum requirements prescribed by the lieutenant governor for use in any precinct inside the city or organized borough. (§ 4.42 ch 83 SLA 1960)

A.S. 15.20.250. Prescribing minimum requirements. The lieutenant governor shall prescribe the minimum requirements of voting machines and with the assistance of the Department of Administration, shall conduct tests necessary to determine the adequacy of any particular type or make of machine. Any person, company or corporation may apply to the lieutenant governor to examine their voting machine and to certify the machine as meeting the minimum requirements prescribed by law. The minimum requirements shall be prescribed to insure secrecy to the voter, to permit voting both for candidates and on propositions and questions, to prevent improper voting in primary elections, to minimize error in marking ballots, and to assure accuracy in counting returns. Uncertified machines may not be used for any election. (§ 4.43 ch 83 SLA 1960; am § 33 ch 116 SLA 1972)

A.S. 15.20.260. Preparation of machine ballots. Upon request of the lieutenant governor, the clerk of each city and organized borough shall report the serial number of voting machines which will be used in each precinct at the next election. The lieutenant governor shall prepare and distribute the required number of machine ballots or ballot labels for each candidate and for each proposition or question. The lieutenant governor shall prescribe (1) the sequence of offices, questions, and propositions as will most nearly conform to the sequence on paper ballots, and (2) the order of the names of candidates for the machine ballots in each precinct to assure that every second precinct has a different sequence of names of candidates so far as practicable by changing the order of names for each office so that each name appears substantially an equal number of times at the top, at the bottom, and at each intermediate place. (§ 4.44 ch 83 SLA 1960)

A.S. 15.20.270. Conduct of instructional meetings. The borough and city clerks shall, under the district electino supervisor, within 21 days of the election, conduct meetings for the purposes of instructing judges about the operation of voting machines and their duties. Each judge shall attend one meeting preceding the election at which he is to serve. Judges and borough and

city clerks are entitled to the same hourly compensation as provided by law for judges serving on election day. (§ 4.45 ch 83 SLA 1960)

A.S. 15.20.280. General duties of borough and city clerks. Upon receipt of the ballot labels, the clker of the borough or city shall place them in the ballot frames upon the machines in a manner as directed by the lieutenant governor. The clerk shall set the counters at zero and lock the operating device. He shall keep a record of which machine was used in each precinct. (§ 4.46 ch 83 SLA 1960)

A.S. 15.20.290. Preparation of voter instructions. The lieutenant governor shall prescribe special instructions to assure the proper use and operation of the voting machines which the clerk of the city or borough shall give to the election boards and which election boards shall give to voters in precincts using voting machines. (§ 4.47 ch 83 SLA 1960)

A.S. 15.20.300. Delivery of voting mcahiens. The clerk of the city or borough or the election supervisor shall deliver voting machines to the election board of each precinct using the machines. Delivery shall be made in sufficient time to check the voting machines and place them for use before

the opening of the polls. (§ 4.48 ch 83 SLA 1960)

A.S. 15.20.310. Preparation of voting machines. Before opening the polls, the election board shall se if the counters are set at zero and if the ballot labels are arranged properly. If the counters and ballot labels are improperly set, the board may not unlock the operating device but shall notify the clerk of the city or borough. The clerk shall reset the counters or properly arrange the ballot labels. If the counters and ballot labels are properly set, the board shall unlock the operating device at the time the polls are open. (§ 4.49 ch 83 SLA 1960)

A.S. 15.20.320. Placement of voting machine. The election board shall place the machine in a position that will assure the secrecy of the ballot and adequate supervision by the election board. (§ 4.50 ch 83 SLA 1960)

A.S. 15.20.330. Provision for write-in ballots. Ballots cast for a person whose name does not appear on the machine may be referred to as write-in ballots. Write-in ballots may be cast only in a general or special election and may be deposited, written or affixed in or upon the device provided on the machine for that purpose. (§ 4.51 ch 83 SLA 1960)

A.S. 15.20.340. Requirement for instruction. Any qualified voter may receive instruction by the election board with the aid of instruction cards and mechanical model of the machine. At least one judge shall at all times be in attendence to provide instruction with cards or a mechanical model of the machine. (§ 4.52 ch 83 SLA 1960)

A.S. 15.20.350. Provision for assistance. Election judges and clerks may assist a voter who is incapable of reading or operating the voting machine. (§ 4.53 ch 83 SLA 1960)

A.S. 15.20.360. Procedure upon voting. After receiving necessary instruction or with the assistance from an election official, a qualified voter may proceed to a vacant voting machine booth and cast his vote. (§ 4.54 ch 83 SLA 1960)

A.S. 15.20.370. Procedure on malfunction. If a machine malfunctions during the election, the election board shall lock the machine to prevent its further use. The board may use any reserve voting machine which the state, city, or borough may have available or may use paper ballots to proceed with the voting. (§ 4.55 ch 83 SLA 1960)

A.S. 15.20.380. Counting of votes cast. After the polls are closed, the election board shall lock the operating mechanism

of the machine. The board, in the presence of watchers, shall proceed to uncover the registering counters, read the vote, including the write-in ballots, and compute the totals. In computing the vote, the board may count a write-in ballot cast for a person for an office whose name appears on the machine as a candidate for that office. If two ormore machines, or if a machine and paper ballots were both used in the precinct, the borad shall compute the sum of the totals from each. (§ 4.56 ch 83 SLA 1960; am § 34 ch 116 SLA 1972)

A.S. 15.20.390. Procedure upon completing count. When the count is completed, the election board shall make a certificate of results in duplicate. The certificate shall include the number of votes cast for each candidate, for and against each proposition and yes or no on each question and any further information in the manner prescribed by the lieutenant governor. The board shall then send one copy of the certificate, all write-in ballots, the original register, all oaths and affidavits made in one envelope to the lieutenant governor. (§4.57 ch 83 SLA 1960)

A.S. 15.20.400. Disposition of voting machine and supplies. The election board shall return the locked voting machine and send the duplicate certificate and register to the city or borough clerk.

The lieutenant governor shall prescribe the manner in which the registers and other election materials are preserved, transferred, and destroyed. The voting machine shall remain locked against use for a period of at least 30 days and as much longer as may be necessary or advisable because of any existing or threatened election contest, except that a voting machine may be opened and all data and figures in it examined upon order of a judge of a court having jurisdiction. (§ 4.58 ch 83 SLA 1960)

A.S. 15.20.410. Local canvass by city and borough clerks. The city and borough clerks shall canvass the vote by checking the figures on the duplicate certificate against the figures on the counting device and the write-in ballots on the voting machine. If a mistake has been made, the clerk shall recall the election board and the board shall issue a corrected election certificate. If no mistake has been made, the clerk shall certify to the election supervisor the correct figures verifying the election board's certificate of results. (§ 4.59 ch 83 SLA 1960)

A.S. 15.20.420. Procedure for state canvass. The state canvass of votes cast by voting machines shall include only a comparison of the election certificates furnished by the election boards with the

certifications from the city and borough clerks. (§ 4.60 ch 83 SLA 1960)

A.S. 15.20.430. Authorization of recount application. (a) A defeated candidate or 10 qualified voters who believe there has been a mistake made by an election official or by the canvassing board in counting the votes in an election, may file an application within five days after the completion of the state canvass to the lieutenant governor for a recount of the votes from any particular precinct or any election district and for any particular office, proposition, or question. However, the application may be filed only within three days after the completion of the state canvass after the general election for a recount of votes cast for the office of governor and lieutenant governor. If there is a tie vote as provided in A.S. 15.15.460, the lieutenant governor shall initiate the recount and give notice to the interested parties as provided in § 470 of this chapter.

(b) The date on which the lieutenant governor receives an application rather than the date of mailing or transmission determines whether the application is filed within the time allowed under (a) of this section. If the actual physical delivery by telegram of a copy in substance of the statements made in the application for recount is received in the office of the

lieutenant governor at or before 5:00 p.m. Alaska Standard time, on the due date the application will be accepted; providing the original signed application is postmarked at or before 5:00 p.m. Alaska Standard time of the same day. (§ 4.71 ch 83 SLA 1960; am § 20 ch 136 SLA 1966)

A.S. 15.20.440. Form of application. (a) The application shall state in substance the basis of the belief that a mistake has been made, the particular election precinct or election district for which the recount is to be held, the particular office, proposition, or question for which the recount is to be held, and that the person making the application is a candidate or that the 10 persons making the application are qualified voters. The candidate or persons making the application shall designate by full name and mailing address two persons who shall represent the applicant and be present and assist during the recount. Any person may be named representative, including the candidate himself or any person signing the application, and the representatives shall be paid in the same amount and manner as election judges. Applications by 10 qualified voters shall also include the designation of one of the number as chairman. The candidate or persons making the application shall sign the application and shall print or type their full name and mailing address.

(b) Candidates, political parties, or organized groups having a direct interest in a recount and who are seeking to protect their interests during a recount may provide, at their own expense, not more than two observers to witness the recount. (§ 4.72 ch 83 SLA 1960; am § 18 ch 80 SLA 1963)

A.S. 15.20.450. Requirement of deposit. The application shall include a deposit in cash, by certified check, or by bond with a surety approved by the lieutenant governor. The amount of the deposit is $50 for each precinct, $250 for each election district, and $2,000 for the entire state. However, if the recount includes an office for which candidates received a tie vote, or the difference between the number of votes cast was 10 or less or was less than .5 per cent of the total number of votes cast for the two candidates for the contested office, or a question or proposition for which there was a tie vote on the issue, or the difference between the number of votes cast in favor of or opposed to the issue was 10 or less or was less than .5 per cent of the total votes cast in favor of or opposed to the issue, the application need not include a deposit and the state shall bear the cost of the recount. If, on the recount, a candidate other than the candidate who received the original election certificate is declared elected, or if the vote on recount is determined

to be four per cent or more in excess of the vote reported by the state canvass for the candidate applying for the recount or in favor or opposed to the question or proposition as stated in the application, the entire deposit shall be refunded. If the entire deposit is not refunded, the lieutenant governor shall refund any money remaining after the cost of the recount has been paid from the deposit. (§ 4.73 ch 83 SLA 1960; am § 15 ch 125 SLA 1962; am § 21 ch 136 SLA; am § 1 ch 77 SLA 1976)

A.S. 15.20.460. Determination of date of recount. If the lieutenant governor determines that the application is substantially in the required form, he shall fix the date of the recount to be held within three days after the receipt of an application requesting a recount of the general election votes cast for the office of governor and lieutenant governor and within five days after the receipt of an application requesting a recount for any other office, question, or proposition. (§ 4.74 ch 83 SLA 1960)

A.S. 15.20.470. Requirement of notice. The lieutenant governor shall give the candidate or designated chairman signing the application, the two persons appointed to represent the applicant during the recount, and other directly interested parties, notice of the time and place of the recount by certified

mail, by telegram, or by telephone. (§ 4.75 ch 83 SLA 1960)

A.S. 15.20.480. Procedure for recount. In conducting the recount, the lieutenant governor, or his appointed representative, shall review all paper, absentee, and machine ballots whether or not the ballots were counted at the precinct or by the district absentee canvassng board to determine which ballots, or parts of ballots, were properly marked and which ballots are to be counted in the recount, and may check the accuracy of the original count, the precinct certificate and the canvass. For administrative purposes, the lieutenant governor may join and include two or more applications in a single review and count of votes. The rule governing the counting of marked ballots by the election board shall be followed in the recount. The ballots and other election material shall remain in the custody of the lieutenant governor during the recount and the highest degree of care shall be exercised to protect the ballots against alteration or mutilation. The recount shall be completed within five days. The lieutenant governor may employ additional personnel necessary to assist in the recount. (§ 4.76 ch 83 SLA 1960)

A.S. 15.20.490. Certification of results. If it is determined by recount

that the plurality of votes was cast for a candidate, the lieutenant governor shall issue a certificate of election or nomination to the elected or nominated candidate as determined by the recount. If it is determined by the recount that a proposition or question should be certified as having received the required vote, the lieutenant governor shall so certify. (§ 4.77 ch 83 SLA 1960)

A.S. 15.20.500. Authorization for expanding recount. Repealed by § 6 ch 26 SLA 1966.

A.S. 15.20.510. Provision for appeal to courts. A candidate or any person who requested a recount who has reason to believe an error has been made in the recount (1) involving any questions or proposition or the validity of any ballot may appeal to the superior court in accordance with applicable court rules governing appeals in civil matters, and (2) involving candidates for the legislature or Congress or the office of governor and lieutenant governor may appeal to the supreme court accordance with rules as may be promulgated by the court. Appeal shall be filed within five days of the completion of the recount. Upon order of the court, the lieutenant governor shall furnish the record of the recount taken including all ballots, registers, and other election material and papers pertaining to the election

contest. The appeal shall be heard by the court sitting without a jury. The inquiry in the appeal shall extend to the questions whether or not the lieutenant governor has properly determined what ballots, parts of ballots, or marks for candidates on ballots are valid, adn to which candidate or division on the question or proposition the vote should be attributed. The court shall enter judgment either setting aside, modifying, or affirming the action of the lieutenant governor on recount. (§ 4.79 ch 83 SLA 1960; am § 19 ch 80 SLA 1963)

A.S. 15.20.520. Provision for appeal to legislature or Congress. A candidate or persons who requested a recount, who have reason to believe an error has been made in the recount involving a candidate for the general election for the state legislature or Congress, may appeal to the chamber in which the candidate seeks membership in accordance with applicable rues of the legislature or Congress. Upon request of the legislature or Congress, the lieutenant governor shall furnish the record of the recount taken including all ballots, registers, and other election material and papers pertaining to the election contest. (§ 4.80 ch 83 SLA 1960)

A.S. 15.20.530. Determination of tie votes. If after a recount and appeal two or more candidates tie in having the

highest number of votes for the same office, the lieutenant governor shall notify the candidates who are tied. The lieutenant governor shall notify the candidates of a reasonably suitable time and place to determine the successful candidate by lot. After the determination has been made by lot, the lieutenant governor shall so certify. (§ 4.81 ch 83 SLA 1960)

A.S. 15.20.540. Grounds for election contest. A defeated candidate or 10 qualified voters may contest the nomination or election of any person or the approval or rejection of any question or proposition upon one or more of the following grounds: (1) malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election; (2) when the person certified as elected or nominated is not qualified as required by law; (3) any corrupt practice as defined by law sufficient to change the results of the election. (§ 4.91 ch 83 SLA 1960)

A.S. 15.20.500. Jurisdiction and time for contest. The action may be brought in the superior court within 10 days after the completion of the state canvass. (§ 4.92 ch 83 SLA 1960)

A.S. 15.20.560. Judgment of court. The judge shall pronounce judgment on which candidate was elected or nominated and

whether the question or proposition was accepted or rejected. The lieutenant governor shall issue a new election certificate to correctly reflect the judgment of the court. If the court decides that the election resulted in a tie vote, the lieutenant governor shall immediately proceed to determine the election by lot as is provided by law. If the court decides that no candidate was duly elected or nominated, the judgment shall be that the contested election be set aside. The provisions of this section and §§ 540 and 550 of this chapter are not intended to limit or interfere with the power of the legislature to judge the election and qualifications of its members. (§ 4.93 ch 83 SLA 1960)

A.S. 15.20.590. Appointment of officials. (a) For every area of the state designated by him for punch-card voting, the lieutenant governor shall appoint a Data Processing Review Board which is responsible to him for the evaluation of all computer phases of the election. The board shall consist of at least three members. At least one member shall be a member of the political party whose candidate for governor received the largest number of statewide votes at the preceding general election, one shall be a member of the party whose candidate received the second largest number of votes, and one shall be registered to

vote either as an "independent" or "nonpartisan" or shall have declined to state his party affiliation when registering to vote. At least one of the members must be familiar with the election process, and at least two must have some expertise in computer programming and processing. The election supervisor shall name one of the members who has sufficient familiarity with computer programming and operations as presiding officer of the board.

(b) For the computer counting center in his area, each election supervisor shall appoint

(1) a receiving board consisting of at least one person from each political party; and

(2) a control board consisting of at least one person from each political party. (§ 2 ch 120 SLA 1975)

A.S. 15.20.600. Party representation. In §§ 590 -- 730 of this chapter, wherever there is a provision for a person to represent a political party, he shall be chosen by the appointing official subject to the approval of the district committee of that party. If the committee makes a reasonable objection, another person shall be appointed. (§ 2 ch 120 SLA 1975)

A.S. 15.20.610. Alternate site. For each computer counting center, the lieutenant governor shall designate an

alternate site, if available, to be used in the event of equipment failure at the main location. If the computer fails and no alternate site is available, the election supervisor shall designate emergency counting teams to handcount punch-card ballots in the manner prescribed for paper ballots. (§ 2 ch 120 SLA 1975)

A.S. 15.20.620. Tests and security. (a) No later than one week before the election, the computer punch-card vote counting program must be tested in the presence of and to the satisfaction of the Data Processing Review Board. Testing shall take place at both the main and alternate computer counting centers.

(b) In addition to the test specified in (a) of this section, other tests shall be made to ensure that the system is functioning properly

(1) at least one day before the election at a time specified by the Data Processing Review Board presiding officer;

(2) on the day the election one hour before the polls close;

(3) immediately after the final vote tabulation is complete:

(4) approximately one hour before the processing of the absentee and challenged ballots; and

(5) immediately after the final vote tabulation of absentee and challenged ballots is complete.

(c) As a security precaution, after the computer has been tested as prescribed in (b)(2) and (4) of this section, the computer system shall remain idle and the area secured until tabulation of punch-card ballots begins.

(d) During the final tabulation by computer, a manual count of different individual races in six precincts chosen at random shall be made, and the results checked against those of the system.

(e) If a problem is encountered during any of the testing or tabulating procedures, additional tests may be conducted as considered necessary. (§ 2 ch 120 SLA 1975)

A.S. 15.20.630. Demonstration. A demonstration of the punch-card process shall be made available to each voter at the polling place before he begins the voting process and each voter shall be informed that the demonstration is available. (§ 2 ch 120 SLA 1975)

A.S. 15.20.640. Processing at polling place. (a) Immediately after the polls have closed, the ballot box shall be opened by election board members in full view of all persons present, and all ballots shall be removed from the ballot envelopes.

(b) The ballot cards shall be inspected individually, and any ballots which are damaged so that they cannot be read by the computer, or are marked so

that the voter can be identified, shall be withdrawn and placed in the facsimile ballot envelope.

(c) The ballots containing write-in votes shall be banded together and placed behind the other undamaged ballot cards which have been voted. The facsimile ballot envelope and the envelope containing questioned and challenged ballots shall be banded to the computer-ready ballots, and the bundle placed in a special container and sealed, with the seal signed by the election board members.

(d) The special container shall be placed in a transport box which shall be locked, sealed, or otherwise secured before delivery to the computer counting center. (§ 2 ch 120 SLA 1975)

A.S. 15.20.650. Delivery of ballots to computer counting center. The delivery of ballots from the precinct polling place to the designated computer counting center shall be made by a delivery team consisting of two members of the election board, one from each of the two major political parties. The delivery team shall accompany the ballots from the precinct polling place to the receiving board at the computer counting center. (§ 2 ch 120 SLA 1975)

A.S. 15.20.660. Receipt of ballots at computer counting center. (a) A state trooper shall be on duty at the computer

counting center during the processing of ballots.

(b) Immediately inside the computer counting center the receiving board shall

(1) receive the transport box and examine the seal; if the seal is damaged or otherwise not intact the board shall notify the election supervisor immediately; if the seal is intact the receiving board shall sign a receipt to that effect and acknowledge delivery;

(2) check the precinct off on a log sheet, enter the arrival time, intiial the entry, and have the delivery team sign the log sheet; and

(3) deliver the special container to the control board. (§ 2 ch 120 SLA 1975)

A.S. 15.20.670. Receipt of ballots by control board. The control board shall

(1) cut the seal and remove all ballots and envelopes from the special container;

(2) insert the proper header and end cards into the ballots;

(3) place the ballot bundles and facsimile envelope in a tray for delivery to the computer room; and

(4) give the envelope containing questioned and challenged ballots to the Data Processing Review Board. (§ 2 ch 120 SLA 1975)

A.S. 15.20.680. Counting of ballots by computer. (a) All processing in the

computer room shall be under the supervision of the Data Processing Review Board presiding officer. The presiding officer shall resolve any problems which arise by consulting with other members of the board.

(b) The computer operator shall process the ballots by

(1) picking up the ballots of one precinct; removing any ballots he finds to be defective and adding them to the facsimile envelope;

(2) comparing the precinct identification on the header card against that of the envelope to insure that they are the same; any discrepancy noted shall be brought to the attention of the presiding officer of the Data Processing Review Board;

(3) placing the cards in the computer card reader and activating it;

(4) returning the counted ballots with the write-in ballots still separated, and the facsimile envelope to the Data Processing Review Board. (§ 2 ch 120 ch 120 SLA 1975)

A.S. 15.20.690. Alternate site counting. (a) A computer service technician shall be on standby duty during the entire vote counting process. If equipment failure occurs and the Data Processing Review Board determines that the repairs cannot be made within a reasonable time, the computer room process shall be moved to

the alternate site if one is available. If an alternate site is not available, all ballots, including those previously counted, shall be counted manually in the computer counting center.

(b) If an alternate site is available, all ballots including those previously counted shall be boxed, and a receipt prepared. The ballot programs shall also be sealed. The sealed material shall then be transported to the alternate location accompanied by a state trooper, the election supervisor, the computer operator, and the Data Processing Review Board. On arrival at the alternate site, the board shall initiate a test run to insure that the computer is functioning properly. After checking the seals on all containers, the supervisor and presiding officer shall sign the receipt and open all ofthe materials. All of the ballots shall be counted at the alternate site, including those already counted at the main location.

(c) After processing is completed, the write-in ballots, the facsimile envelope, and the envelope containing the challenged and questioned ballots shall be given to the election supervisor, and the remaining ballots shall again be sealed and transported to a designated place of security. All computer tapes resulting from the aborted counting operation shall be erased and the summary cards destroyed. (§ 2 ch 120 SLA 1975)

A.S. 15.20.700. Disposition of ballots. (a) The ballots which have been counted in the computer room shall be sealed by the Data Processing Review Board. The sealed ballots shall then be transported to a designated place of security. The facsimile envelopes, questioned and challerged ballots shall be sealed and given to the election supervisor for tallying. Any ballots containing write-in votes shall be sealed and given to the election supervisor for tallying by the district absentee ballot canvassing board.

(b) A representative of the lieutenant governor's office and a state trooper shall meet any aircraft carrying computer ballots to the capital, and accompany them to the security area there.

(c) The ballot image magnetic tape which contains a exact image of each counted ballot shall be retained in a secure manner by the election supervisor until the lieutenant governor determines that it is no longer needed. (§ 2 ch 120 SLA 1975)

A.S. 15.20.710. Report of partial results. The presiding officer of the Data Processing Review Board may authorize activation of the print program to provide partial results, if time permits. This print-out shall be released to the presiding officer of the Data Processing Review Board who shall

file the original with the control board and provide copies for posting and distribution to news media representatives. (§ 2 ch 120 SLA 1975)

A.S. 15.20.720. Public observation. The punch-card counting process shall be available for public viewing by closed circuit television, or by direct observation to the extent that election officials and computer personnel will not be hindered in the performance of their duties. (§2 ch 120 SLA 1975)

A.S. 15.20.730. Interpretation of ballot marks. (a) A vote for a candidate whose name is not printed on the ballot shall be counted only if the name is written in, the square following it is punched, and the number of punches does not exceed the number of offices available. A write-in vote for a candidate whose name is also printed on the ballot may be counted only if the square following the written name is punched, the square following the printed name is not punched, and the number of punches does not exceed the number of offices available.

(b) The computer shall be programmed to count ballots as follows:

(1) a vote may be counted only if the punch is clearly spaced in the square designated by plus sign following the name of the candidate the voter desires to select;

(2) if there is only one plus-marked square for a team whose names are on separate lines, such as president and vice-president or governor and lieutenant governor, a punch in the square or elsewhere in the rectangle following the names shall be counted for that team;

(3) a failure to properly punch a ballot card as to one or more candidates does not itself invalidate the entire ballot;

(4) if a voter punches fewer names than there are persons to be elected to the office, a vote shall be counted for each candidate properly marked;

(5) if a voter punches more names than there are persons to be elected to the office, the votes for candidates to that office shall not be counted;

(6) improper marks on the ballots shall not be counted and shall not invalidate punches for candidates properly made;

(7) an erasure or correction invalidates only that section of the ballot in which it appears;

(8) a vote marked for the candidate for President of the United States is considered and counted as a vote for the election of presidential electors. (§ 2 ch 120 SLA 1975)

ALASKA STATUTES

TITLE 15 - ELECTIONS

§15.05.010. Voter qualifications. A person may vote at any election who

(1) is a citizen of the United States;

(2) has passed his 18th birthday;

(3) Repealed by §38 ch 116 SLA 1972.

(4) has been a resident of the state and of the election district in which he seeks to vote for at least 30 days just before the election; and

(5) Repealed by §1 ch 15 SLA 1970.

(6) has registered before the election as required under ch. 7 of this title and is not registered to vote in another jurisdiction.

§15.07.010. Registration of voters. The precinct election judges at any

election shall allow a person to vote whose name is registered and who is qualified under AS 15.05.010 in the precinct in which he intends to vote.

§15.07.060. Required registration information. (a) Each application who requests registration or re-registration shall supply the following information:

(1) name and sex;

(2) address and other necessary information establishing residence if requested;

(3) election district and precinct as of the date of registration;

(4) term of residence in state and in election district; and whether the applicant has previously been registered to vote in another jurisdiction, and, if so, where;

(5) a declaration that the registrant

will be 18 years of age or older on or before the date of the next statewide election;

(6) a declaration that the registrant is a citizen of the United States;

(7) date of application;

(8) signature or mark.

(b) If the applicant has been previously registered to vote in another jurisdiction, he shall surrender to the registration official any voter registration or identification card or credentials from that jurisdiction the applicant may possess. The lieutenant governor shall notify the chief elections officer in that jurisdiction that the applicant has registered to vote in Alaska, request that jurisdiction to cancel the applicant's voter registration there, and return the applicant's voter registration

or identification card or credentials, if any, to that jurisdiction.

§15.07.065. Exchange of voter registration information. The lieutenant governor shall enter into reciprocal agreements or other arrangements for the exchange of voter registration information with the election officers in other jurisdictions to ensure that the state's voter registration register is accurate and up to date and to preclude a person from voting in Alaska and in another jurisdiction at the same election, thus preventing election fraud.

§15.07.070. Procedure for registration. (a) The lieutenant governor shall promulgate rules and regulations consistent with the provisions of this

section to enable voters to register.

(b) To register by mail the lieutenant governor or the area election supervisor shall furnish, upon request, and at no cost to the voter, forms prepared by the lieutenant governor on which the registration information required under §60 of this chapter shall be inserted by the voter, or by a person on behalf of the voter if he is physically incapacitated. The forms shall be executed before two Alaska residents if the person registering is in the state. If the person is outside the state, the forms shall be executed before a person qualified to administer oaths. Upon receipt and approval of the completed registration forms the lieutenant governor or the election supervisor shall forward to the voter an acknowledgment in the form of a registration card, and his name shall

immediately be placed on the master register located in the office of the lieutenant governor and on the district register located in the office of the election supervisor. If the registration is denied, the voter shall immediately be informed in writing by certified or registered letter that registration was denied and the reason for denial.

(c) All applications for registration by mail shall be postmarked at least 30 days before the next ensuing primary or general election. An application to register which was not postmarked before the 30-day requirement shall not be considered to be invalid, but shall be considered by the lieutenant governor as an application by the voter to be registered to vote in the next subsequent primary or general election and to remain on the master regis-

ter thereafter.

(d) Qualified voters may register in person before a registration official at any time throughout the year, except that no registration may be made within 30 days preceding an election. Upon receipt and approval of the registration forms the lieutenant governor or the election supervisor shall forward to the voter an acknowledgment in the form of a registration card and his name shall immediately be placed on the master register located in the office of the lieutenant governor and on the district register located in the office of the election supervisor.

(e) Repealed by §38 ch 116 SLA 1972.

§15.07.090. Re-registration. (a) A voter whose name is changed by marriage or court order may vote under the previous

name, but if the voter desires to use the new name, he or she shall notify the lieutenant governor not later than 30 days preceding an election so that the registration may be amended to reflect the change.

(b) A voter shall re-register if his registration is cancelled for failure to vote in prior elections as provided in §130 of this chapter. The re-registration may not be made later than 30 days preceding an election.

(c) The lieutenant governor shall transfer the registration of a voter from one precinct to another within an election district when requested by the voter. The request shall be made 30 or more days before the election day. The lieutenant governor shall transfer the registration of a voter from one election district to

another when requested by the voter. The voter must reside in his new election district for at least 30 days in order to vote.

(d) A person who claims he is a registered voter, but for whom no evidence of registration in the precinct can be found, shall be granted the right to vote in the same manner as that of a questioned voter and his ballot shall be treated in the same manner. The ballot shall be considered to be a "questioned ballot" and shall be so designated. The lieutenant governor or his representative shall determine whether the voter is registered in the election district before counting the ballot. A voter who has failed to obtain a transfer as provided in (c) of this section shall vote a "questioned ballot" in his precinct of residence.

§15.15.010. General administrative supervision by lieutenant governor. The lieutenant governor shall provide general administrative supervision over the conduct of state elections, and may issue any regulations under the Administrative Procedure Act (AS 44.62) necessary for the administration of elections to protect the interest of the voter and assure administrative efficiency. When the lieutenant governor is administering a borough or special election, he may issue regulations under AS 44.62 changing the time required for notices of election, appointment of election officials, absentee voting, canvass of the vote, and election recounts.

§15.15.213. Questioning a voter's ballot. If his polling place is in question a voter shall be allowed to vote,

and any election official shall consider the ballot as a questioned ballot.

§15.15.215. Disposition of challenged and questioned votes. (a) A challenged voter or one who casts a questioned ballot shall vote his ballot in the same manner as prescribed for other voters except that he shall use a paper ballot. After the election judge removes the identification number from the ballot, the challenged voter shall insert the ballot into a small blank envelope, seal it and put the envelope into a larger envelope on which the oath and affidavit he previously signed is located. After the election judge removes the identification number from the ballot, the voter who casts a questioned ballot shall insert the ballot into a small blank envelope, seal

it, and put the envelope into a larger envelope on which the information concerning that voter's residence is located. These larger envelopes shall be sealed and deposited in the ballot box along with their respective attached statements of asserted invalidity. All envelopes shall be counted and compared to the voting list before leaving the place of polling and upon receipt by the official or body supervising the election. When the ballot box is opened, these envelopes shall be segregated and delivered to the official or body supervising the election. The merits of the challenge or question shall be determined by this official or body in accordance with the procedure prescribed for challenged absentee votes in AS 15.20.210.

(b) A person who frivously, maliciously or in bad faith challenges a voter or

questions his ballot is guilty of a misdemeanor and upon conviction s[illegible]ll be imprisoned for not more than 30 da[illegible] r fined not more than $100, or both.

§15.15.230. Providing ballot to voter. When the voter has qualified to vote, the election judge shall give him an official ballot. The voter shall retire to a booth or screen to mark the ballot for the candidates of his choice.

§15.15.370. Completion of canvass. When the canvass is completed, and in no event later than the day after the election, the election board or counters shall make a certificate in duplicate of the results. The certificate includes the number of votes cast for each candidate, for and against each proposition, yes or no on

each question, and any additional information prescribed by the lieutenant governor. The election board shall, immediately upon completion of the certificate or as soon thereafter as the local mail service permits, send in one sealed package to the lieutenant governor one copy of the certificate, the original register, all ballots unlawfully exhibited, properly identified, the record of ballots destroyed under §250 of this chapter, and all oaths and affidavits. In addition, all ballots properly cast shall be mailed to the lieutenant governor in a separate, sealed package. Both packages, in addition to an address on the outside, shall clearly indicate the precinct from which they come. Each board shall, immediately upon the completion of the certificate and as soon thereafter as the local mail ser-

vice permits, send the duplicate certificate and the duplicate register to its respective election supervisor. The lieutenant governor may authorize election boards in precincts in those areas of the state where distance and weather make mail communication unreliable to forward their election certificates by telegram or radio. The lieutenant governor may authorize the unofficial canvass of votes on a regional basis by election supervisors, tallying the votes as indicated on duplicate certificates. To assure adequate protection the lieutenant governor shall prescribe the manner in which the ballots, registers, and all other election records and materials are thereafter preserved, transferred, and destroyed.

§14.15.430. Scope of canvass. (a) The canvass by the lieutenant governor shall include only

(1) a review and comparison of the tallies of paper ballots in the election poll books with the precinct election certificates to correct any mathematical error in the count of paper ballots,

(2) a review of the tallies of write-in ballots and a comparison of election certificates as provided by law from precincts using voting machines,

(3) the canvass of absentee ballots as prescribed by law.

(b) If the lieutenant governor finds an unexplained error in the tally of paper ballots in any precinct election poll book, he may count the ballots from the precinct. If the lieutenant governor finds the precinct counters have not

entered tallies in the precinct tally books but have certified a candidate as having received a fixed number of votes, the lieutenant governor may recount the ballots from that precinct. The lieutenant governor shall certify in writing to the state canvass board any changes resulting from the count.

§15.15.440. Dates for opening and closing state canvass. The state canvass shall begin eight days after the election and be continued daily until completed. The lieutenant governor may designate the hours a day the state canvass board is to conduct its canvass. The lieutenant governor shall close the canvass when he is satisfied that no missing precinct certificate of election would, if received, change the results of the election. If no

election certificate has been received from a precinct, the lieutenant governor may secure from the election supervisors and may count a certified copy of the duplicate election certificate of the precinct. If no election poll books have been received, but an authorized election certificate has been received by telegram or radio, the lieutenant governor shall count the election certificate so received. If the lieutenant governor has reason to believe that a missing precinct certificate, if received, would affect the result of the election, the lieutenant governor shall await the receipt of the certificate until four o'clock in the afternoon of the 15th day after the date of election. A certificate not actually delivered to the lieutenant governor by four o'clock on the 15th day after the

election shall not be counted at the canvass.

§15.20.210. Procedure for district canvass. (a) On the second day following the date of election, the election supervisor, in the presence and with the assistance of the district absentee ballot canvassing board shall meet and examine all voter certificates on hand. No ballot shall be counted if the voter has failed to properly execute the certificate, if the witnesses or the officer or other person authorized by law to administer the oath fails to affix his signature, or if the voter fails to enclose his marked ballot inside the small envelope provided. The election supervisor or a member of the district absentee ballot canvassing board may challenge the name

of an absentee voter when read from the voter's certificate on the back of the large envelope, if he has good reason to suspect that the challenged voter is not qualified to vote, is disqualified, or has voted at the same election. The person making the challenge shall specify the basis of the challenge in writing. The district board by majority vote may refuse to accept and count the absentee ballot of a person properly challenged. If the absentee ballot is refused, the district supervisor shall return a copy of the statement of the challenge to the absentee voter, and shall enclose all rejected ballots in a separate envelope with statements of challenge. The envelope shall be labeled "rejected ballots" and shall be forwarded to the lieutenant governor with the election certificates

and other returns. If the absentee ballot is not refused, the large envelope shall be opened, the smaller, inner blank envelope shall be placed in a container and mixed with other blank absentee ballot envelopes. The mixed smaller blank envelopes shall be drawn from the container, opened, and the ballots counted according to the rules of determining properly marked ballots as are provided for counting by the election board. Upon completion of the canvass, the election supervisor shall prepare an election certificate of results in the manner provided for the preparation of election certificates by precinct election boards, and shall forward the original certificates and returns to the lieutenant governor no later than the day the district canvass is completed.

(b) Notwithstanding (a) of this

section, in instances where a resident of the state has received his absentee ballot for the wrong election district and his ballot is returned to the election supervisor having jurisdiction over the election district in which he actually resides, the votes cast for statewide candidates and state senate candidates, if the person has voted for candidates from the senate election district in which he resides, shall be counted. Votes for a constitutional amendment or statewide referendum shall also be counted. Votes for other local candidates shall be held invalid.

§15.20.540. Grounds for election contest. A defeated candidate or 10 qualified voters may contest the nomination or election of any person or the ap-

proval or rejection of any question or pro-position upon one or more of the following grounds: (1) malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election; (2) when the person certified as elected or nominated is not qualified as required by law; (3) any corrupt practice as defined by law sufficient to change the results of the election.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 78-1301

WALTER J. HICKEL and EDWARD A. MERDES,

Petitioners,

v.

LOWELL THOMAS, JR., PATTY ANN POLLEY, MARY JO HOBBS, JOANNE CRANE, OCTAVIA HANSEN, ANN SPIELBERG, JAY HAMMOND, CHANCY CROFT, and JALMAR KERTTULA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Lowell Thomas Jr., Patty Ann Polley, Mary Jo Hobbs, JoAnne Crane, Octavia Hansen, and Anne Spielberg, respectfully request that this Court deny the petition for writ of certiorari seeking

review of the Alaska Supreme Court's opinion in this case. 1/

QUESTIONS PRESENTED

Is the decision of the Alaska Supreme Court so arbitrary and void of support in the record and in state law that petitioners have been denied due process of law in violation of article V and the fourteenth amendment of the United States Constitution?

STATEMENT OF THE CASE

On August 22, 1978, the State of Alaska conducted a statewide primary election for nominations to numerous offices, including nominations for the federal offices of senator and representative, and for the state offices of governor, lieutenant governor and numerous seats in the Alaska Legislature. While there was certainly interest in each of the races, it was the race for

1/ The Alaska Supreme Court opinion is unreported. A copy of the opinion is appended to the Petition for Writ of Certiorari (hereinafter "Pet. for Cert".) as Appendix B.

governor which consumed the attention of virtually every citizen of the state. Because it was generally believed that the winner of the republican primary for governor would be the next governor of Alaska, it was the race in that primary which drew the most attention and more specifically, the race between the incumbent, Governor Jay Hammond, and a former governor, Wally Hickel.

Late in the evening of primary election day, unofficial reports indicated Wally Hickel was leading Governor Hammond by approximately 1,000 votes. Democratic contender Croft held a somewhat smaller lead over democratic contender Merdes. Remaining to be counted were ballots from the bush villages, absentee ballots and "questioned ballots." 2/ The vote totals at this point were not surprising for the votes from Anchorage, Mr. Hickel's

2/ AS 15.15.213. Questioning the voter's Ballot. If his polling place is in question, a voter shall be allowed to vote, and any election official shall consider the ballot as a questioned ballot.

traditional area of support, are counted by computer and the results known shortly after the polls close, while the votes from the bush villages, a traditional source of support for Governor Hammond, 3/ must be hand-counted. The hand counting of ballots, combined with the immense size of bush Alaska, with its attendant transportation and communication problems, commonly delays election results from these areas until days after voting has ended. 4/

When all the votes were finally tallied, incumbent Governor Hammond was declared the winner of the republican primary, by a margin of 98 votes, and Senator Croft the winner of the democratic primary, by approximately 270 votes.

3/ In 1974, Governor Hammond had trailed the democratic incumbent on election night but more than a week after the election, when the bush votes had finally been counted and the results communicated to the election centers, was declared the victor by a margin of approximately 237 votes.

4/ In a number of locations, the election materials are transported by dogsled and Eskimo sealskin boats.

So long as petitioner Hickel was in the lead, petitioners appeared satisfied and no complaints about the manner in which the election was run were heard. 5/ Shortly after the final results were announced, however, charges of fraud and corruption began to eminate from the petitioners' camps. In the courtroom, petitioners made no specific allegations of fraud or corruption, though they made every effort to hold that specter over the courtroom. 6/ No evidence of fraud or corruption was ever presented to the superior or supreme courts and neither court found any indication of fraud or corruption. Pet. for Cert., at Appendices A-60 and B-5.

5/ Petitioner Merdes trailed throughout the counting of ballots.

6/ At page 69 of the petition, petitioners add another participant to their conspiracy theory by stating, with the most disrespectful connotations, that the Alaska Supreme Court's decision resulted from the fact that the justices were "so satisfied with the results of the election."

Following a complete audit of the entire election, as well as a recount of all votes cast, with counsel for petitioners, respondent candidates and state officials participating in each, petitioners filed two actions in the Alaska courts. By one complaint, petitioners sought to contest the election and obtain an order directing that a new primary election be held, but only for the office of governor. 7/ By their second action, petitioners sought judicial review of decisions of the Lieutenant Governor concerning whether certain ballots had been marked in a

7/ AS 15.20.540 states in part:

> Grounds for election contest. A defeated candidate or ten qualified voters may contest the nomination or election of any person upon one or more of the following grounds:
>
> (1) Malconduct, fraud, or corruption on the part of an election official sufficient to change the results of the election. . .

lawful manner by the voter. 8/

Virtually all of the facts relevant to the election contest emanated from the post election audit 9/, and therefore the parties to the election contest were able to stipulate to most of the facts and proceed on summary judgment.

8/ AS 15.20.510 provides in part:

> A candidate or any person who requested a recount who has reason to believe an error has been made in the recount . . . involving candidates for . . . the office of governor . . . may appeal to the Supreme Court . . . The inquiry in the appeal shall extend to the question of whether or not the lieutenant governor has properly determined what ballots, parts of ballots, or marks for candidates on ballots are valid, and to which candidate . . . the vote should be attributed. . .

9/ Petitioners did attempt to develop facts independent of the audit by publicly soliciting affidavits from citizens who thought they had observed unlawful election practices. Approximately 150 of these affidavits were presented to the superior court. Approximately one-third of these were never signed by the alleged affiant (See, Pet. for Cert., at Appendices A-9 and B-45, n. 14) and the remainder either were based upon hearsay or alleged occurrences which were not violations of Alaska's election laws.

From the outset of the litigation it was evident that irrespective of the superior court decision, the case would be appealed to the Alaska Supreme Court. Furthermore, there was need for an expeditious final resolution of the litigation because of the impending general election. Consequently, all documents filed with the superior court were simultaneously filed with the supreme court, thereby permitting the members of the court to familiarize themselves with the record at the earliest possible time.

Shortly after the conclusion of oral argument on summary judgment, the superior court rendered its decision overturning only the gubernatorial primary election. Pet. for Cert., at Appendix A. An appeal of the superior court decision was immediately filed by respondents herein. The Alaska Supreme Court heard the case on an expedited basis and, in a unanimous decision, concluded that the facts and the law necessitated the reversal of the decision of the superior court

judge. Pet. for Cert., at Appendix B.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioners seek review of a federal question never raised below.

Petitioners' election contest complaints to the superior court did not specify a single federal constitutional question; the only issues raised concerned the proper interpretation of and compliance with the election laws of Alaska. As a result, the superior court's opinion is devoid of any mention of a federal issue. To the contrary, the opinion states:

> The ultimate matter to be decided in these motions for summary judgment is whether the undisputed facts, <u>when tested under the election laws of Alaska</u>, constitute malconduct on the part of election officials sufficient to change the results of the primary election held on August 22, 1978. (emphasis added)

Pet. for Cert., at Appendix A-15.

Following decision on summary judgment by the superior court, petitioners submitted statements of points on cross-appeal to the Alaska

Supreme Court. Again, petitioners made no mention of a federal issue of any sort. 10/ The first mention by petitioners of a federal issue in this litigation occurred at pages 104-107 of petitioners' opening brief to the Alaska Supreme Court. Pet. for Cert., at Appendices E-1 - 2 and D-15.

The opinion of the Alaska Supreme Court does not address the federal constitutional issues. The court's silence, however, is in accord with Alaska Appellate Rule 9(e), which provides in part:

> At the time of filing his notice of appeal, the appellant shall serve and file . . . a concise statement of the points on which he intends to rely on the appeal. The court will consider nothing but the points so stated. . . (emphasis added)

10/ At a few points in their filings with the Alaska courts, petitioners made passing mention of their "equal protection rights" and "due process rights." This Court, however, has held that such vague references are insufficient to raise a federal issue and that such references will be presumed to refer to the state constitution. New York ex rel Bryant v. Zimmerman, 278 U.S. 63, 67-68 (1928); Bowe v. Scott, 233 U.S. 658, 664-665 (1914); New York Central and H. R. Company v. New York, 186 U.S. 269, 273 (1902).

The opinion is also in accord with past decisions applying Rule 9(e). E.g., Myers v. Sill, 497 P.2d 920 (Alaska 1972); Sanuita v. Common Laborer's and Hod Carrier's Union, 402 P.2d 199 (Alaska 1965); Swick v. Seward School Board, 379 P.2d 972 (Alaska 1962).

While the opinion of the Alaska Supreme Court is silent as to the reason for not ruling on the federal question untimely raised by petitioners, this Court has repeatedly held that when

> the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the agrieved party in this Court can affirmatively show the contrary.

Street v. New York, 394 U.S. 576, 582 (1969); see also, Fuller v. Oregon, 417 U.S. 40, 50, n. 11 (1974); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945).

Petitioners failure to properly raise before the Alaska courts the federal issues set

forth in the petition for certiorari at page 13, ¶2(j), precludes this Court, as a jurisdictional matter, from considering those issues. Tacon v. Arizona, 410 U.S. 351, 352 (1973); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 334 (Dissenting opinion) (1968).

To avoid the denial of their petition for failure to properly raise the federal issue below, petitioners attempt to gain access to this Court by asserting that the unanimous decision of the Alaska Supreme Court was so lacking of support in the record and so erroneous in its interpretation of state law that the Alaska Supreme Court itself denied petitioners their federal equal protection, privileges and immunities, and due process rights.

Though petitioners sought rehearing by the Alaska Supreme Court, their petition made no allegation that the court's decision infringed upon any of their federal constitutional rights.

See, Pet. for Cert., at Appendix D. For the reasons set forth above, this Court may not consider these issues, raised for the first time before this Court.

2. Petitioners have failed to present any issue of sufficient national importance to call for review by this Court.

Petitioners assert this case is of national significance because the effect of the Alaska Supreme Court's decision was to preclude their names from appearing on the ballot in Alaska's general election. 11/ However, it should not be the ultimate effect of the decision of the Alaska Supreme Court which determines whether a national issue is present, but rather the rulings on the underlying issues which resulted in the ultimate holding in the case.

11/ Petitioner Hickel ran in the general election as a write-in candidate.

An examination of the decisions of the Alaska superior and supreme courts reveals that every issue in the case concerned an interpretation of state law and the application of a complex and voluminous factual record to those laws. No issue of national significance was presented or decided and therefore there is no issue of national significance for this Court to review.

To bolster their "national significance" argument, petitioners allude to the alleged disenfranchisement of "a large percentage" of Alaska's population. Pet. for Cert., at page 40. This allegation is peculiar indeed for throughout the litigation of this case it has been the petitioners who have sought to disenfranchise thousands of registered voters by asserting their votes were illegal under Alaska law. See, Pet. for Cert., at Appendices B-57 - 59 and D. Respondents, on the other hand, have sought to have all votes counted, including those they knew did not favor the incumbent candidate. See, Pet. for

Cert., at Appendix A-11 - 15.

While the source of petitioners alleged belief that "a large percentage" of Alaska's population was disenfranchised is not entirely clear, we presume petitioners reference is to those allegations set forth in their brief before the Alaska Supreme Court. Pet. for Cert., at Appendix E. We turn briefly to those allegations.

(a) Cross-district and cross-precinct voting policy.

The Alaska Supreme Court concluded, 12/ and properly so, that no evidence had been presented nor findings made to support the trial courts statement that "it is fair to conclude that many thousands more" persons would have voted if they had understood cross-district and cross-precinct voting. 13/ With regard to the trial court's equally unsupported "fair" conclusion that

12/ Pet. for Cert., at Appendix B-47 - 48.

13/ Pet. for Cert., at Appendix A-93.

"hundreds of voters were turned away from the polls", 14/ the trial courts findings of fact make no mention of any evidence supporting this conclusion and, to the contrary, indicate that voters wishing to vote in a district or precinct other than their own were allowed to do so. See, Pet. for Cert., at Appendix A-25 - 32. While there was some evidence presented which indicated a few people had been turned away from a polling place and told to go vote in their own precinct or district, no evidence was presented to show they did not do so.

(b) Failure to mail absentee ballots.

Petitioners presented no evidence that contradicted the trial court's finding, adopted by the supreme court, that

> All absentee ballots were sent out no later than one day following the receipt of the application. There was no failure or refusal to mail out [absentee] ballots timely requested.

Pet. for Cert., at Appendix A-45; See also, Pet. for Cert., at Appendix A-52(7).

14/ Id.

(c) Villages of Hyder, Stony River and Lime Village.

The opinions of the trial court and the supreme court do not mention these villages for the simple reason that petitioners never mentioned them until their Petition for Rehearing to the Alaska Supreme Court. Pet. for Cert., at Appendix E-1 - 2. Not a scintilla of evidence was presented at trial in support of petitioners' allegations concerning these villages. Moreover, the superior court specifically found that "[t]here was no failure or refusal to mail out absentee ballots timely requested." Pet. for Cert., at Appendix A-45; See also, Pet. for Cert., at Appendix A-52(7).

(d) "Newly Married Maidens".

The trial court found that 14 persons attempted to vote under their married names, though they were registered under their maiden names. Pet. for Cert., at Appendix A-22; but see, Pet. for Cert., at Appendix B-82(A), indi-

cating the same suprior court, in the recount case, stated there were 20 such persons. The conclusion of the trial court and supreme court was that newly married persons wishing to vote under their new name must register under their new name at least 30 days before the election, and, further, that the law does not require election officials to ask every registered voter whether they recently have changed their name. Pet. for Cert., at Appendix A-74 and B-82 - 84. Notice of the need to reregister if recently married was given by the Alaska Voter Handbook. Pet. for Cert., at Appendix B-84.

In summary, the alleged disenfranchisement of a "large percentage" of Alaska's voters, when compared to the facts presented at trial, is reduced to 14 or 20 newly married voters who were not allowed to vote under their new name because they failed to comply with Alaska voter registration laws.

3. The Alaska Supreme Court correctly decided the properly presented issues.

Petitioners to date have not made any effort to place the factual record of this case before this Court in support of their claims. In the absence of the record, it is rather difficult for respondents to meet petitioners' repeated assertions that the record does not support various conclusions reached by the Alaska Supreme Court. Following is a brief response to those assertions of petitioners which can be addressed based upon the documents now before this Court. 15/

(a) Validation of the election.

The opinion of the Alaska Supreme Court clearly sets forth the superior court's basic error in interpreting Alaska's election contest statute, 16/ an error which led the superior court

15/ The letters correspond to those appearing in the Pet. for Cert., at pages 5 - 14.

16/ Pet. for Cert., at Appendix B-4 - 17.

to the illogical conclusion, inter alia, that while the 2,000 ballots possessed by Taylor West had not been tampered with in any way, and indeed should have been counted, those same ballots somehow tainted the election results. Pet. for Cert., at Appendices A-30 - 40, A-101 - 102, and B-17 - 21. 17/

(b) Apportioning of random illegal votes.

The apportioning of 185 18/ random invalid votes was neither "unprecedented" nor "unauthorized by . . . prior judicial decision." Indeed, the practice is common and dates back to as early as 1890. See, e.g., Grounds v. Lawe, 193 P.2d 447 (Arizona 1948); Canales v. City of

17/ With respect to these same 2,000 ballots, petitioners allege it was "improper for the Alaska Supreme Court to make a finding, contrary to that of a trial court, that 'there was no evidence that the ballots had been disturbed or tampered with during the time that they were in West's custody.'" Pet. for Cert., at page 50. Yet that was precisely the finding of the trial court. Pet. for Cert., at Appendix A-40 and A-102.

18/ Pet. for Cert., at Appendix B-91A - 91H.

Alviso, 474 P.2d 417 (Cal. 1970); Singletary v. Kelley, 51 Cal. Rptr. 682 (Cal. App. 1966); Russell v. McDowell, 23 P. 183 (Cal. 1890); Thornton v. Gardner, 195 N.E.2d 732 (Ill. 1964); Boland v. City of La Salle, 19 N.E.2d 177 (Ill. 1938); Flowers v. Kellar, 153 N.E. 351 (Ill. 1926); Choisser v. York, 71 N.E. 940 (Ill. 1904); Ollmann v. Kowalewski, 300 N.W. 183 (Wis. 1941); Hamilton v. Marshall, 282 P. 1058 (Wyo. 1930).

Had the Alaska Supreme Court merely concluded that, in an election in which the two leading contenders had received virtually an equal share of the votes, it was unlikely that out of 185 random votes, the trailing candidate would have been able to make up a margin of 98 votes, the court would have been on equally sound footing. De Martini v. Power, 262 N.E.2d 857 (N.Y. 1970); Ippolito v. Power, 241 N.E.2d 232 (N.Y. 1968); See generally, Finkelstein and Robbins, Mathematical Probability in Election Challenges, 73 Colum. L. Rev. 241 (1973).

(c) Rulings on validity of ballots.

This allegation is not sufficiently particular to permit a response.

(d) Use of official election certificates.

Assuming petitioners are referring to the use at the recount of official election certificates for two locations from which ballots had not been received 19/, Alaska's election statutes specifically state that official election certificates are valid evidence of election results. 20/

19/ Pet. for Cert., at Appendices A-32 - 36 and B-21 - 25.

20/ AS 15.15.430 states in part that "the canvass by the lieutenant governor shall include only

(1) a review and comparison of the tallies of paper ballots in the election poll books with the precinct election certificates to correct any mathematical error in the count of paper ballots,

(2) a review of the tallies of write-in ballots and a comparison of election certificates as provided by law for precincts using voting machines . . .

(footnote continues on following page)

While the actual ballots cast are certainly the best evidence of the results of an election, the superior and supreme courts agreed that the actual ballots are not the only evidence which may be used to determine election results. Other courts confronted with missing ballots but valid election certificates have also used the election certificates as conclusive evidence of the election results. Opinion of the Justices, 367 A.2d 209 (N.H. 1976); Ambrust v. Starkey, 119 N.E.2d 910 (Ill. 1954).

20/ (continued)

AS 15.15.440 states in part that . . . the lieutenant governor shall close the [state] canvass when he is satisfied that no missing precinct certificate of election would, if received, change the results of the election. If no election certificate has been received from a precinct, the lieutenant governor may secure from the election supervisors and may count a certified copy of the duplicate election certificate of the precinct. If no election poll books have been received, but an authorized election certificate has been received by telegram or radio, the lieutenant governor shall count the election certificate so received. . .

(e) Counting of the 247 ballots.

With respect to the 247 ballots found after the election, the testimony before the superior court was that "both experts concluded that the ballots probably have not been tampered with, but were unable to conclusively say that they were not tampered with." Pet. for Cert., at Appendix A-38 and A-97 - 100.

Contrary to petitioners' allegation, the Alaska Supreme Court accepted the superior court's factual findings with regard to these ballots, but concluded that the superior court had applied a burden of proof that was erroneous as a matter of law.

> While we affirm the factual findings of the superior court, we reverse its holding as to the legal standard to be applied to those findings.

Pet. for Cert., at Appendix B-27 - 28. 21/

(f) Cross-district and cross-precinct voting.

The Alaska Supreme Court did not totally ignore the "fact found by the Trial Court" that "thousands of voters" were effected by the administration of cross-precinct and cross-district voting. The supreme court considered the issue, but upon examination of the entire record of the proceeding, was unable to find any evidence to support the trial court's "fair conclusion". Pet. for Cert., at Appendix B-47 - 48.

21/ The petition for certiorari is replete with allegations which are contrary to the facts of record, the purpose of such assertions being to cast an undeserved shadow of suspicion over the primary election and the unanimous decision of the Alaska Supreme Court. One of the most glaring examples of these erroneous assertions is the claim that the "count of these [247] ballots favored respondents Hammond and Croft," leaving the impression that these ballots swung the close election in favor of the incumbent, Governor Hammond. Pet. for Cert., at p. 24. Contrary to this assertion, however, the final count of the 247 ballots favored Wally Hickel, not Governor Hammond.

The superior court specifically upheld the legality of cross-district and cross-precinct voting. Pet. for Cert., at Appendix A-78 - 85. The Alaska Supreme Court also specifically upheld the legality of cross-precinct voting. Pet. for Cert., at Appendix B-38 - 39.

Contrary to petitioners allegation that a majority of the Alaska Supreme Court found that cross-district voting was not allowed under Alaska's constitution 22/, the supreme court's opinion makes it clear that the issue was not even reached by a majority of the court, since a majority concluded that petitioners, having demanded that cross-district votes be counted, had waived any right to challenge the validity of cross-district voting. Pet. for Cert., at Appendix B-39 - 43A.

22/ Pet. for Cert., at pages 8 - 9.

(g) Waiver of right to challenge cross-district and cross-precinct ballots.

The opinion of the Alaska Supreme Court very clearly sets forth the evidence of record that supported its finding of waiver by petitioners of their right to challenge cross-district votes. See, Pet. for Cert., at Appendix B-42 - 43.

With respect to petitioners allegation that candidates' observers were not allowed to challenge the validity of absentee or questioned ballots at the state canvass, they were specifically accorded that right by the lieutenant governor, but they failed to appear at the canvass at the time they were told it would start. In a superior court case which took place prior to the end of the counting of ballots and which addressed this specific issue, the court informed petitioners that they certainly had the right to be present, but that they had no right to delay the entire state election until a time when they might find it convenient to appear for the count.

(h) Counting of absentee ballots.

The superior court properly concluded that the alleged defects in the absentee ballots did not, under Alaska law, mandate their invalidation and that, in any event, petitioners had waived their right to challenge these ballots for they had failed to challenge any such ballots at the time they were counted, despite having the opportunity to do so. Pet. for Cert., at Appendix A-106 -107. The supreme court correctly upheld the superior court's ruling. Pet. for Cert., at Appendix B-70 - 74.

(i) "Early count" of punchcard ballots.

While petitioners allege that the "early count" of punch-card computer ballots violated "a host of integrated specific statutes", unspecified herein, both the superior and supreme courts found that no statutes had been violated. Pet. for Cert., at Appendices A-58 - 59; A-112 -113; B-80 - 82.

CONCLUSION

It is evident from the above that petitioners' assertion that the Alaska Supreme Court decided this case in an arbitrary manner is at odds with the opinions of the Alaska courts, and with the record. On virtually every question of the legality under state law of various voting procedures, the superior court and supreme court agreed. The superior and supreme courts also were in agreement on virtually every issue of fact. Their fundamental difference throughout centered on the proper interpretation of Alaska's election contest statute, and petitioners have not challenged the supreme court's interpretation of that statute.

The theme which threads its way throughout the petition is that petitioners believe Alaska's election laws are in a shambles and this Court should step in and straighten them out. We respectfully suggest that, if petitioners truly

believe Alaska's election laws should be changed, the proper forum within which to air this complaint is the Alaska State Legislature, though to date petitioners have made no effort to do so.

For the foregoing reasons, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED, this _____ day of March, 1979 at Juneau, Alaska.

AVRUM M. GROSS
ATTORNEY GENERAL

By:
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